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No. 74, ORIGINAL

In The

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF GEORGIA,

Plaintiff,

v.

STATE OF SOUTH CAROLINA,

Defendant.

ON THE REPORTS OF THE SPECIAL MASTER

EXCEPTIONS OF THE STATE OF GEORGIA AND SUPPORTING BRIEF

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EXCEPTIONS OF THE STATE OF GEORGIA

1. The State of Georgia excepts to the recommendation of the Special Master that the Barnwell Islands,[1] although islands in the Savannah River and thus in Georgia by the Treaty of Beaufort of 1787 which reserved all islands to Georgia, are now in South Carolina by virtue of prescription and acquiescence, on the following grounds:

(a) Prescription and acquiescence has no application because South Carolina is not in possession

[1] Georgia does not except to the Special Master's recommendation regarding the most upstream of the Barnwell Island group, sometimes referred to as Rabbit Island.

of the Barnwell Islands and has not been since at least 1955;

(b) Even if the theory of prescription and acquiescence is applicable, the proof adduced by South Carolina falls far short of that required to change the boundary agreed to by South Carolina in the Treaty of Beaufort of 1787.

2. Georgia excepts to the Special Master's recommendation regarding Oyster Bed Island and the mouth of the Savannah River, because of the Master's departure from the doctrine of the geographic middle which was prescribed by the Court in *Georgia v. South Carolina*, 257 U.S. 516 (1922); use of the navigation channel, as the Special Master recommends, has been specifically disallowed by the Court.

3. Georgia excepts to the Special Master's use of a right angle line to connect the boundary in stream around an island in the Savannah River with the boundary in the mainstream of the river; such method of demarcation is inconsistent with the holding in *Georgia v. South Carolina*, 257 U.S. 516 (1922), that the boundary is midway between the island shore and the South Carolina shore.

4. Georgia excepts to the Special Master's recommendation that islands of natural formation which emerged after the Treaty of Beaufort in 1787 are not in Georgia if they emerged "on the South Carolina side of the river," as such a recommendation conflicts with the Treaty of Beaufort provision reserving "all islands" to Georgia and disregards the decree in *Georgia v. South Carolina*, 259 U.S. 572 (1922), that "all islands formed by nature" are in Georgia.

5. Georgia excepts to the Special Master's delineation of the lateral seaward boundary because of his use of the navigation channel as the starting point; the lateral seaward boundary should originate in the geographic middle of the mouth of the Savannah River, equidistant from the Georgia and South Carolina shores.

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ON THE REPORTS OF THE SPECIAL MASTER

BRIEF FOR THE STATE OF GEORGIA IN SUPPORT OF ITS EXCEPTIONS TO THE REPORTS OF THE SPECIAL MASTER

INTRODUCTION

The boundary between Georgia and South Carolina, in dispute during the colonial and early statehood period, was settled and fixed by the two states by the Treaty of Beaufort in 1787, which established the boundary as "the most northern branch or stream of the River Savannah, . . . reserving all the islands in the said Rivers

Savannah and Tugoloo to Georgia."[1] Any confusion concerning interpretation of that language was resolved by this Court in *Georgia v. South Carolina*, 257 U.S. 516 (1922), holding that the boundary is the geographic middle of the boundary stream, rather than the thalweg, and that "where there are islands, the line is midway between the island bank and the South Carolina shore when the water is at ordinary stage." *Id.* at 523. The Court decreed in that case that "all islands formed by nature" are reserved to Georgia. *Georgia v. South Carolina*, 259 U.S. 572 (1922).

The present case arose because of uncertainty concerning the location of the boundary in the mouth of the Savannah River and the boundary from the mouth to the edge of the territorial sea, areas never before specifically addressed by this Court. The filing of Georgia's Complaint was precipitated by an incident in 1977 in which a South Carolina fisherman trawling for shrimp in the mouth of the Savannah River resisted arrest by Georgia Conservation Rangers and fled to South Carolina, which subsequently refused extradition. Complaint para. 21; 1st Report at 101 n.83. Georgia's Complaint also sought to confirm that all islands in the Savannah River are in Georgia, even if now affixed to the South Carolina shore. Complaint para. 9.[2]

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[1] For the convenience of the Court, Articles I and II of the treaty are attached as Appendix A to this brief.

[2] Georgia's Complaint specifically refers to Pennyworth Island, Barnwell Island(s), Jones Island, Oyster Bed Island, and several unnamed islands. Complaint para. 9. South Carolina originally claimed Pennyworth Island but subsequently

(Continued on following page)

In his First Report the Special Master has recommended a boundary which, without justification, disregards the decision of this court in *Georgia v. South Carolina* and recommends that Barnwell Island, Oyster Bed Island and two unnamed islands are located in South Carolina. The task of the Special Master was rather simple, to follow the Treaty of Beaufort as construed definitively by the 1922 decision of the Court and to locate the boundary midway between the island bank and the South Carolina shore. The exceptions filed by Georgia address his departures from that directive; Georgia excepts to the Special Master's recommendation where he has failed to locate the boundary in the geographic middle of the most northern stream or branch of the Savannah River. To adopt the Special Master's recommendation would be to hold that certain islands in the Savannah River are in South Carolina; Georgia submits that such a holding would be in clear contravention of the decision of this Court in 1922.

With specific reference to Barnwell Island, the recommendation of the Special Master, if adopted by this Court, would allow South Carolina, by its counterclaim based on prescription and acquiescence, to gain dominion over a tract of land which has been within the jurisdiction of Georgia pursuant to a decision of the Fifth Circuit in 1955. The Special Master's report allows South Carolina

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acknowledged that Pennyworth Island is in Georgia. 1st Report at 3 n.1. The Special Master ruled that all the remaining islands named in the Complaint are in South Carolina. Georgia excepts to the recommendations regarding the Barnwell Islands (except Rabbit Island), Oyster Bed Island, and two unnamed islands.

to use the doctrine of prescription and acquiescence in an offensive way, to acquire territory not within her borders by the Treaty of Beaufort; previous decisions of this Court have applied the doctrine only to affirm the status quo.

STATEMENT OF THE CASE

This case was initiated by Georgia's Motion for Leave to File Complaint and Complaint, submitted to the Court in August, 1977. Georgia's Complaint alleged a boundary dispute in the lower reaches and mouth of the Savannah River and a dispute concerning the lateral seaward boundary between the two states. In particular, Georgia referred to difficulties in the enforcement of commercial fishing laws, noting a specific incident in July, 1977. Georgia asserted that a number of islands in the Savannah River now affixed to the South Carolina shore by avulsive actions of the Corps of Engineers should be declared to be in the State of Georgia. The Complaint was ordered filed by this Court on October 31, 1977. *Georgia v. South Carolina,* 434 U.S. 917 (1977).

South Carolina filed an Answer and Counterclaim, asserting South Carolina jurisdiction over all areas in dispute. The case was referred to the Special Master by an order entered February 21, 1978. *Georgia v. South Carolina,* 434 U.S. 1057-58 (1978).

By stipulation of the parties, the case was bifurcated and tried in two parts: First, the boundary in the Savannah River; secondly, the lateral seaward boundary between the two states.

The trial of phase one of this case was held in April, May and June, 1981; the Special Master submitted his First Report to the Court in March, 1986. The trial of phase two, the lateral seaward boundary, was held in January, 1987, and the Second and Final Report of the Special Master was submitted to the Court in March, 1989, and ordered filed on April 24, 1989. As required by that order, the exceptions on behalf of the State of Georgia are filed within 45 days.

HISTORY OF THE BOUNDARY BETWEEN GEORGIA AND SOUTH CAROLINA

The Special Master has comprehensively explained the history of the boundary between Georgia and South Carolina, 1st Report at 4-9, including the fact that in the colonial period Georgia's superior claim to the river was recognized, 1st Report at 5, and that neither in the colonial period nor at the time of the Treaty of Beaufort, did South Carolina ever make claim to any island in the Savannah River. 1st Report at 5-6. Georgia's right to the islands in the Savannah River has always been recognized; previous disputes between the two states concerning the Savannah River boundary have dealt with navigation rights in the 18th and 19th centuries, *South Carolina v. Georgia,* 93 U.S. 4 (1876), and in the 20th century, with the right to taxation of dams and hydroelectric plants. *Georgia v. South Carolina,* 257 U.S. 516, 518.

The Treaty of Beaufort of 1787 clearly sets forth the agreement between the two states that Georgia had the superior right over the Savannah River. The boundary is declared to be fixed in "the most northern branch or

stream of the River Savannah from the Sea or mouth of such stream . . . reserving all the islands" in the Savannah River to Georgia. Appendix A, Article I. Article II of the Treaty resolved the dispute over navigation by guaranteeing to South Carolina free right of navigation in a specified channel of the river. Appendix A. The treaty reflected the contemporary understanding that the superior rights in the Savannah River, both in terms of territory and in terms of navigation, were those of the State of Georgia. As this Court understood and explained in the 1922 decision, the boundary set forth in Article I of the treaty is independent of and by no means synonymous with the navigation channel of the river:

> Obviously such a stream may be wide and deep and may contain the navigable channel of the river, or it may be narrow and shallow and insignificant in comparison with the adjacent parts of the river. But such variety of conditions cannot affect the location of the boundary line in this case, because, by Article II of the Convention, equal and unrestricted right to navigate the boundary rivers is secured to the citizens of each State, irrespective of the location of the navigable channel with respect to the boundary line.

Georgia v. South Carolina, 257 U.S. at 521.[3] The Court there held that "[w]here there are islands the [boundary] line is midway between the island bank and the South Carolina shore . . . " *Id.* at 523.

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[3] The significance of this guarantee by Georgia to South Carolina of the right to navigate the river was short-lived; ratification of the Constitution by the requisite number of states in 1789 constituted surrender of the right to regulate

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SUMMARY OF ARGUMENT

By the Treaty of Beaufort of 1787, as construed by this Court in *Georgia v. South Carolina*, 257 U.S. 515 (1922), *all islands* in the Savannah River are in Georgia. Appendix A. In spite of this essential legal principle, the Special Master's recommendation would put the Barnwell Islands, Oyster Bed Island and two unnamed islands in South Carolina.

The First Report of the Special Master, taken as a whole, reflects his fundamental dissatisfaction with the boundary line as established by the framers of the Treaty of Beaufort and as construed by this Court in 1922.[4] For whatever reason, the Special Master is clearly more com-

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navigation to the federal government, and all citizens of the United States have the right to navigation on the river. *See South Carolina v. Georgia*, 93 U.S. at 9-10 (dismissing South Carolina's request for an injunction to prohibit the U.S. Army Corps of Engineers from improving navigation in the Savannah harbor by blocking the channel on the South Carolina side of Hutchinson's Island to the detriment of the channel in which free navigation had been guaranteed by the Treaty of Beaufort).

[4] The Master stated that "South Carolina persuasively argues that the drafters of the Convention of Beaufort could never have intended . . . a widely meandering line away from the river's main flowing portions to places where the water was insignificant in depth and quantity." 1st Report at 10. In discussing South Carolina's contention that the boundary is the middle of the most northern flowing channel, the Master stated, "The contentions of South Carolina are very persuasive. But for the fact that this Court has previously interpreted the Treaty of 1787, subsequently approved by Congress, in its 1922 opinion, the Special Master may well have concluded to the contrary." 1st Report at 12 n.6.

fortable with a boundary in the main channel of the River, and it is this lack of appreciation for the boundary as established by the Treaty of Beaufort and as construed by this Court which has led the Special Master to diverge, at virtually every opportunity, from the boundary which has been established since 1787, in order to place his recommended boundary in or near the mainstream or the navigation channel of the river, to the detriment of Georgia and the rights secured to Georgia by the Treaty of Beaufort in 1787.[5]

I. THE BARNWELL ISLANDS

The Special Master found that the Barnwell Islands were marsh islands in the Savannah River in 1787 and thus in Georgia as of that date. With the exception of the most upstream of these islands (generally referred to as Rabbit Island), the Barnwell Islands remained islands in the Savannah River and discernible as such well into the 20th Century when, by avulsive actions of the Corps of Engineers, they became affixed to the South Carolina shore.

The Special Master held that the Barnwell Islands are in South Carolina as a result of prescription and acquiescence, based on his findings of ownership, possession, cultivation and taxation in South Carolina. This recommendation is legally incorrect for two independent reasons.

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[5] Attached to this brief as Appendix B is a map showing the Special Master's recommended boundary in yellow and the Georgia contention as to the correct line in red.

First, and simplest, is the basic premise that prescription and acquiescence must be based on possession in the party asserting it. Possession is an essential element of the theory, for prescription and acquiescence, like adverse possession, is a doctrine which preserves the status quo. This essential element is clearly lacking in the case put forward by South Carolina. While there were South Carolina grants to the islands (as well as an earlier Georgia grant), and evidence of 30 - 40 years of actual possession and cultivation pursuant to the South Carolina grant, the period of South Carolina jurisdiction was judicially terminated by the decision in *United States v. 450 Acres of Land*, 220 F.2d 353 (5th Cir.), *cert. denied*, 350 U.S. 826 (1955), holding that "There is, there can be, no doubt that the land here involved [Barnwell Island] is in the State of Georgia." *Id.* at 356. Pursuant to that decision, and at all times subsequent thereto, the State of Georgia has fully exercised dominion, sovereignty and ownership of the Barnwell Islands. The Special Master has misapplied the decisions of this Court and disregarded the decision of the Fifth Circuit Court of Appeals in recommending that the State of South Carolina can employ a claim of prescription and acquiescence to wrest dominion of the Barnwell Islands from Georgia.

Secondly, even if the doctrine of prescription and acquiescence were applicable in spite of Georgia's current possession, the evidence in support of South Carolina jurisdiction is simply insufficient to establish a change in the jurisdictional location of the Barnwell Islands from that solemnly agreed to by treaty between the two States.

II. OYSTER BED ISLAND AND THE MOUTH OF THE RIVER

Georgia excepts to the Special Master's recommendation in the area of Oyster Bed Island and the mouth of the Savannah River on the basis of the Special Master's departure from the rule of the geographic middle, which was prescribed by the Court in *Georgia v. South Carolina*, 257 U.S. 516 (1922). The thalweg or main navigable channel doctrine has no application to this boundary line. *Id.* at 521-22.

In spite of this clear directive, in the area of Oyster Bed Island, the Special Master made an unexplained (and Georgia submits, an inexplicable) departure from the geographic middle of the most northern stream in order to reach the modern day dredged navigation channel, and then followed the present day thalweg of the river to the mouth. Appendix B. The effect of this failure to follow the clear teachings of *Georgia v. South Carolina* leads to the erroneous recommendation that Oyster Bed Island is in South Carolina and that the boundary in the mouth of the river is located just north of Tybee Island, Georgia, rather than midway between the Georgia and South Carolina shores.

III. DEMARCATION BY USE OF THE "RIGHT-ANGLE PRINCIPLE"

The Special Master has recommended use of a right-angle line to connect the boundary in an island stream of the Savannah River with the boundary in the mainstream of the river; this method of demarcation has no legal support. The Master's improper use of this principle is

illustrated by the recommended boundary in the area of Pennyworth Island. Appendix B. By definition, the geographic middle is equidistant from the closest point in Georgia and the closest point in South Carolina. The "right-angle principle" results in a boundary closer to the island shore than to the South Carolina shore (therefore not in the middle) and thus conflicts with the holding of the Court in *Georgia v. South Carolina*.

IV. NEWLY-FORMED ISLANDS

The Special Master has recommended that islands of natural formation which emerged in the Savannah River after the Treaty of Beaufort in 1787 are not in Georgia if they emerged "on the South Carolina side of the river." This conflicts with the Treaty of Beaufort provision reserving "all islands" to Georgia and disregards the decree of this Court in *Georgia v. South Carolina* that "all islands formed by nature" are reserved to Georgia. *Georgia v. South Carolina*, 259 U.S. 572 (1922).

V. LATERAL SEAWARD BOUNDARY

In recommending a lateral seaward boundary between Georgia and South Carolina the Special Master has correctly applied the controlling legal principles – equidistance, modified by special circumstances, in order to reach an equitable result. Georgia's objection to the recommended lateral seaward boundary stems from a disagreement with the Special Master's starting point in the navigation channel, which misplaced point of beginning results from the Special Master's erroneous location of the mouth of the Savannah River, as discussed *infra* at

42. Use of the correct starting point in the mouth of the river, midway from the closest points in Georgia and South Carolina, and application of these same legal principles would produce a line north of the one recommended by the Special Master and roughly parallel to it.

VI. SPECIAL MASTER'S SUMMARY OF LEGAL ISSUES

It is instructive to note that the Special Master himself has expressed misgivings concerning his major holdings. The First Report concludes with the Special Master's "Summary of Major Legal Issues," 1st Report at 112-14, in which the Special Master has correctly identified a number of the critical points on which he is now subject to serious challenge. For example, the Special Master has himself posed the question whether he erred "in diverting from the doctrine of *medium filum acquae* as established by the 1922 decision of this Court, in proceeding eastwardly after leaving the southern tip of Turtle Island." 1st Report at 113. Georgia takes exception to the issues nos. 1, 2, 4, 7 and 8, as explicated by the Master, and contends that it is indeed clear that he has erred on each of these points.

ARGUMENT

I.

THE BARNWELL ISLANDS ARE IN GEORGIA BY THE TREATY OF BEAUFORT. THE EVIDENCE DOES NOT SUPPORT THE RECOMMENDATION THAT THE BARNWELL ISLANDS SHOULD BE MOVED TO SOUTH CAROLINA BY PRESCRIPTION AND ACQUIESCENCE.

As the Special Master found, the largest of the Barnwell Islands and the most upstream island were islands in the Savannah River in 1787 and thus in Georgia. 1st Report at 37, 51. With the exception of the most upstream of these islands, sometimes referred to as Rabbit Island,[6] the Barnwell Islands remained islands in the Savannah River and discernible as such well into the 1920's when, by avulsive actions of the Corps of Engineers, they became affixed to the South Carolina shore. 1st Report at

[6] Georgia makes no exception to the Special Master's recommendation that the most upstream of the Barnwell Islands, sometimes referred to as "Rabbit Island", although an island in the Savannah River in 1787, is now in South Carolina, although Georgia certainly does not agree with the rationale that the simple act of accretion of Rabbit Island to the South Carolina shore effectuated a change in the boundary. *Compare* 1st Report at 37, 39 *with Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395, 401 (1870) (holding that Wolf Island was in Kentucky because east of the thalweg in the early 19th century; the change in the Mississippi River to run east of the island did not change the boundary).

13 n.7, 62, 70, 72. A composite exhibit of maps showing changes in the Barnwell Islands from 1855 to 1978 is attached as Appendix C to this Brief.[7] As late as 1931, it was still obvious that the Barnwell Islands were indeed islands. Appendix D is a 1931 aerial photograph of the Barnwell Islands. Ga. Ex. 344.

A.

South Carolina's claim to the Barnwell Islands based on prescription and acquiescence must fail because South Carolina is not now in possession and has not been since at least 1955.

Long acquiescence in the practical location of an interstate boundary, and possession in accordance therewith, has often been used by this Court as an aid in resolving boundary disputes. *E.g., Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591, 638-39 (1846); *Indiana v. Kentucky*, 136 U.S. 479, 510 (1890); *Louisiana v. Mississippi*, 202 U.S. 1, 53 (1906). The doctrine of prescription and acquiescence developed as an analogy to the doctrine of

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[7] Georgia's exception relates to the largest of the islands, which was in existence in 1787, as well as to the two smaller islands which formed downstream after 1787. The Barnwell family members referred to the three largest islands as Rabbit Island, Hog Island, and Long Island, and although these names were not widely used outside the family, the parties and the Special Master have used them for ease of identification. The smallest of the islands, and the latest to form, did not have a family name but is referred to on some maps as Barnwell Island No. 3, and this name has sometimes been used by the parties and the Special Master. In this brief, Georgia uses the term "Barnwell Islands" or sometimes "Barnwell Island" to refer to all the islands except Rabbit.

adverse possession which is used to resolve title disputes between individuals, *e.g., Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926); it is a doctrine used to perpetuate the status quo, not to unsettle things which are established. *See, e.g., Arkansas v. Tennessee*, 310 U.S. 563, 569-70 (1940) (the basis is "the creation of stability of order"). Just as with adverse possession, prescription between states rests on "open long continued and uninterrupted possession." *Michigan v. Wisconsin*, 270 U.S. at 308.

Possession and dominion is an essential element of the claim of sovereignty by prescription and acquiescence. *See Virginia v. Tennessee*, 148 U.S. 503, 524 (1893) (quoting Wheaton, *International Law*, "The uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other. . . ."). It is this essential element which is clearly lacking in the case put forward by South Carolina. While there was evidence of a period of actual use and possession pursuant to a South Carolina grant, the duration of South Carolina's purported dominion was judicially terminated by the decision in *United States v. 450 Acres of Land*, 220 F.2d 353 (5th Cir.), *cert denied*, 350 U.S 826 (1955).

On December 11, 1952, the United States filed a condemnation action in the United States District Court for the Southern District of Georgia, seeking a spoil easement over Barnwell Island (excluding Rabbit Island). Ga. Ex. 378, 1st Report at 13 n.7. The complaint was served on E. B. Pinckney, who then claimed to own the property pursuant to a deed from the Forfeited Land Commission of Beaufort County, as well as on the Sheriff, Treasurer, Auditor and Forfeited Land Commission of Beaufort

County, South Carolina. Ga. Ex. 378. Pinckney appeared and moved to dismiss on the grounds of jurisdiction, claiming that the property was in South Carolina, which motion was granted. *Id.* The State of Georgia then intervened and claimed sovereignty and title over Barnwell Island.[8] *Id.*; 220 F.2d at 354. Evidence was stipulated on the issue of jurisdiction and Pinckney's claim that Barnwell Island was in South Carolina by prescription and acquiescence. Ga. Ex. 378. The evidence advanced for Pinckney included payment of taxes on the land in Beaufort County, South Carolina, as early as 1875; an 1871 mortgage and an 1896 deed conveying the islands and reciting that they were in Beaufort County; and evidence that the Sheriff and Deputy Sheriff of Beaufort County had exercised law encorcement authority on Barnwell Island since the 1920's. Ga. Ex. 378.

On appeal the Fifth Circuit reversed the lower court, holding: "There is, there can be, no doubt that the land here involved [Barnwell Island] is in the State of Georgia." *United States v. 450 Acres of Land*, 220 F.2d at 356. A petition for a writ of certiorari was filed in this Court by Pinckney and was denied. 350 U.S. 826. Georgia filed briefs in the Fifth Circuit and this Court asserting both Georgia sovereignty and title. Ga. Ex. 378, S.C. Ex. S.

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[8] At that time Georgia apparently was not aware of the 1760 colonial Georgia grant of the Barnwell Islands to Tannatt. Ga. Ex. 93, 94, 95, 96. This is not surprising, because grants in this area of Georgia were headright grants; no comprehensive survey of the county was made before or after the grants. S. McClendon, *History of the Public Domain in Georgia* 16 (1924).

Although South Carolina never sought to participate in *United States v. 450 Acres of Land*, South Carolina filed a Motion for Leave to File an original action against Georgia on the subject of the Barnwell Islands, while Pinckney's petition for certiorari was pending. Ga. Ex. 379. The motion was denied. *South Carolina v. Georgia*, 350 U.S. 812 (1955). In 1957, South Carolina again tried to initiate an original action which was also refused. Ga. Ex. 380; *South Carolina v. Georgia*, 352 U.S. 1830 (1957).

Pursuant to the decision in *United States v. 450 Acres of Land*, and at all times subsequent thereto, the State of Georgia has fully exercised dominion, sovereignty and ownership of the Barnwell Islands.

In 1956 the General Assembly of Georgia adopted a resolution granting to the United States a spoilage easement to Barnwell Island, Ga. Ex. 381, and a deed conveying the spoilage easement was executed and recorded. Ga. Ex. 383. The Corps of Engineers has possessed and occupied Barnwell Island pursuant to this deed, Ga. Ex. 363, and since 1956 the area has been built up into a high bluff by disposal of spoil from harbor dredging by the Corps of Engineers. 1st Report at 4, Appendix C.

As a result of these events, the status quo is Georgia jurisdiction, not South Carolina jurisdiction. The Special Master has simply misapplied the decisions of this Court in recommending that South Carolina can utilize a claim of prescription and acquiescence to wrest dominion of the Barnwell Islands from Georgia. The doctrine of prescription and acquiescence cannot be used aggressively to acquire territory but only to confirm the current state of affairs. For example, in *Michigan v. Wisconsin*, 270 U.S.

295, 308, the Court noted that the doctrine depends in part on "uninterrupted possession of territory." *See also Arkansas v. Tennessee*, 246 U.S. 158, 172 (1918) (evidence "falls far short of the long acquiescence in the practical location of a common boundary, and possession in accordance therewith, which . . . has been treated as an aid" in boundary disputes). Counsel are aware of no case where a State has claimed jurisdiction by prescription and acquiescence over land currently within the possession and dominion of the adjacent State. It is this novel position which South Carolina has advanced and the Special Master has upheld.

B.

Even if the theory of prescription and acquiescence were available to the State of South Carolina in spite of the current Georgia possession of the Barnwell Islands, the proof adduced by South Carolina falls far short of that required to change the boundary solemnly agreed upon by the two states in 1787.

Georgia notes that, at first reading, the Special Master's Report may appear to be a thorough sifting and application of the facts with regard to the Barnwell Islands; however, a more careful review of the record reveals that the Master has made a number of clear errors in setting forth and weighing the relevant evidence in this case. "Though the Master's findings on these issues deserve respect and a tacit presumption of correctness, the ultimate responsibility for deciding what are correct findings of fact remains with [the Court]." *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984); *see also Mississippi v. Arkansas*, 415 U.S. 289, 291-92, 294 (1976).

Georgia does not seek to have this Court resolve factual disputes between the parties, for there is little or no dispute as to the facts. Rather, Georgia asks that the Court review the weight given to those facts, in light of the applicable legal principles. Such a review in this case will confirm that the Special Master gave undue weight to unpublished and unrecorded deeds and letters among members of one family, based his conclusion as to a general perception of jurisdictional location on unpublished diaries and manuscripts which contain only innuendo concerning the state boundary, and used tax deeds which are so vague as to be legal nullities, in arriving at a finding of long continued exercise of South Carolina jurisdiction and, even more attenuated, in concluding that the State of Georgia acquiesced in South Carolina's claim. Demonstration of the Master's resulting errors requires a review of the pertinent law and of the facts in the record.

In using the doctrine of prescription and acquiescence to resolve state boundary disputes, the Court has in most instances dealt with acquiescence in a boundary line as established by compact, statute or treaty, *see Vermont v. New Hampshire*, 289 U.S. 593 (1933), or by survey, *see California v. Nevada*, 447 U.S. 125 (1980); *Michigan v. Wisconsin*, 270 U.S. 295 (1926); *Maryland v. West Virginia*, 217 U.S. 1 (1910). In other instances, where the boundary definition is insufficiently precise, the Court has used long possession by one state with acquiescence of the other as an aid in construing the boundary instrument. *See, e.g., Michigan v. Wisconsin*, 270 U.S. 295 (1926); *Indiana v. Kentucky*, 136 U.S. 479, 510, 514, 518 (1890); *Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591, 638-39 (1846).

The cases are rare, indeed, however, where the Court has employed the theory of prescription and acquiescence to change the jurisdictional location of a tract of land which was clearly determined by a boundary agreement. In *Arkansas v. Tennessee*, 310 U.S. 563 (1940), the land in question (Moss Island) was originally on the Arkansas side of the thalweg of the Mississippi River and thus contained within the boundaries of the territory of Arkansas. *Id.* at 566-67. As a result of an avulsion in 1821, the land had been located on the Tennessee side of the main channel of the river since before Arkansas' admission into the Union. *Id.* at 565. The evidence was clear and consistent and wholly on the side of Tennessee jurisdiction. Tennessee had surveyed and granted lands on Moss Island as early as 1824. *Id.* at 567. Moss Island had residents who "always voted in Tennessee elections; were taxed by Tennessee, married by Tennessee Justices of the Peace, required to do roadwork under Tennessee authority, educated upon the island in a school operated by Tennessee." *Id.* at 567. The lands were taxed by Tennessee and sold for taxes by the Tennessee sheriff. *Id.* at 567. There was no showing that Arkansas ever asserted any claims of jurisdiction over the land in controversy prior to the suit. In addition, and critically different from the present case, an opinion of the Supreme Court of Tennessee in 1872 had made the exercise of Tennessee jurisdiction over Moss Island "a matter of public notoriety." *Id.* at 568 (quoting the Report of the Special Master).

To prevail on prescription and acquiescence, the State asserting the claim must establish not only the elements of prescription, which are analogous to the elements of adverse possession, but must also make a showing of

acquiescence on the part of the neighboring State. *See New Jersey v. Delaware*, 291 U.S. 361, 376-77 (1934); *Indiana v. Kentucky*, 136 U.S. 479, 510 (1890). The Special Master acknowledges that acquiescence is the factor deemed the most important by the authorities. 1st Report at 64. Because acquiescence is equivalent to passive consent, knowledge on the part of the acquiescing state is crucial. Y. Blum, *Historic Titles in International Law* 100 (1965) ("Acquiescence being regarded as amounting to passive consent, it is only understandable that it cannot be presumed in those cases where it can be shown that the allegedly acquiescing state has no knowledge of the situation in which it purportedly acquiesced.") Acquiescence can be asserted only after Georgia knew, or should have known, of events detracting from its sovereignty. *See, e.g., Rhode Island v. Massachussetts*, 40 U.S. (15 Pet.) 233, 272-74 (1841); *Indiana v. Kentucky*, 136 U.S. 479, 510 (1890). Inaction by and of itself is of no great importance, it is only silence in the face of circumstances which warrant a response which is legally significant. *Blum, supra* at 99 ("[A]cquiescence is . . . inferred from the silence and inaction of the affected states in circumstances where a state wishing to signify its objection would have been expected to do so in a manner actively indicating its opposition.")[9]

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[9] The Special Master has held that the mere lapse of sufficient time "raises an inference that a state knew, or should have known, of events detracting from its sovereignty and, if the state failed to act, it may be considered as having acquiesced." 1st Report at 64. This holding carves out new legal theory far beyond that previously established by the Court. For

(Continued on following page)

This case presents very little evidence either of prescription on the part of South Carolina or of actual or constructive notice to Georgia sufficient to imply acquiescence on the part of the State of Georgia.

The Barnwell Islands were originally marsh islands; like the other areas in dispute in this case, only since the deposition of extensive amounts of spoil material by the U.S. Army Corps of Engineers have they become of any significant value. 1st Report at 4. Although the islands are only a few miles from the City of Savannah, they have received little attention from anyone except members of the Barnwell family. Except from about 1850 to 1882 when the largest island and, later, parts of other islands were planted in rice, there is little evidence of activities on the islands except illegal whiskey-making, combined with raising hogs fed on the mash. S.C. Ex. C (McTeer Dep.) at 19. The fact that Barnwell Island was considered a good

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example, in *Rhode Island v. Massachusetts*, 10 U.S. (15 Pet.) 233 (1841), cited by the Special Master to support the above proposition, the Court denied Massachusetts' demurrer based on acquiescence and required further proceedings to inquire into the facts and circumstances concerning the inaction, such as whether Rhode Island had notice of the line contended for or whether, because of her inattention to her rights, she should be treated as though she had acquiesced with knowledge. *Id.* at 272-74. In *Indiana v. Kentucky*, 136 U.S. 479 (1890), also cited by the Special Master, Indiana alleged in her complaint that "all the time since her admission [to the Union in 1792] Kentucky has claimed the Green River Island . . . and has asserted and exercised jurisdiction over it, and thus excluded Indiana . . . ," *id.* at 510, and the opinion details the court decisions, joint surveys and events giving notice to Indiana of Kentucky's claim.

location for moonshining in the 1920's and 1930's indicates the extent to which activities on Barnwell Island could go unnoticed by the authorities of Georgia and by the public generally. While the Barnwell Islands were twice granted by South Carolina, 1st Report at 41-42, there were never any residents of the Barnwell Islands and no schools, roads, or other public improvements.[10] Looking to published and recorded documents, the evidence of South Carolina jurisdiction is curiously sparse.[11] After the 1813 South Carolina grant to Archibald Smith, the first deeds of record which contain a description and plat sufficient to indicate that the Barnwell Islands, or indeed any island in the Savannah River, were being treated as South Carolina territory were recorded in 1930. By these deeds the islands as well as property on the South Carolina mainland were divided among the grandchildren of Archibald Smith. 1st Report at 47, S.C.

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[10] During the Civil War, the Confederate forces built a battery on the small spit of land in the river south of the largest of the Barnwell Islands, sometimes referred to as Naval Battery, as well as a larger battery on the largest of the Barnwell Islands, to defend the City of Savannah from invasion from the river. S.C. Ex.B-41, S.C. Ex.B-40, Ga. Ex. 162. To the extent that the jurisdictional location of these defensive batteries was of any significance in the turmoil of war, the evidence is conflicting, with certain unpublished letters and diaries referring to the guns on the largest of the Barnwell Islands as "on the Carolina side," S.C. Ex.-B-47, S.C. Ex.-B-41, and a map prepared by the United States Coast Survey describing the battery as in Georgia. Ga. Ex. 163.

[11] Attached as Appendix E is a Barnwell Island chronology which lists the conflicting evidence regarding the jurisdictional location of the Barnwell Islands (except Rabbit), without including the unpublished and unrecorded documents upon which the Special Master has relied.

Ex.B-10(4), (5), (6), (7), (8).[12] These deeds, although executed in 1868, provided no notice until they were recorded in 1930. By 1930 the Barnwells had abandoned their rice lands along the Savannah River, and the only known activity on the islands was illegal whiskey making.

A more detailed look at the evidence reveals that the islands had been granted by South Carolina in 1795 to Hezekiah Roberts, and then granted again to Archibald Smith in 1813. S.C. Ex.B-1, 2, 5, 6; 1st Report at 41-42. In both instances the grants and the accompanying plats identify the property as "islands" surrounded by the waters of the Savannah River. S.C. Ex.B-1, 2, 5, 6. A grant beyond the territorial boundary of a state is void. *Coffee v. Groover*, 123 U.S. 1, 29 (1887); *Poole v. Fleeger*, 36 U.S. (11 Pet.) 185, 209-10 (1837); *Polk's Lessee v. Wendal*, 13 U.S. (9 Cranch) 87 (1815). Since the Treaty of Beaufort of 1787 reserved all islands in the Savannah River to Georgia, these South Carolina grants were invalid. South Carolina's claim of jurisdiction cannot, therefore, rest on these grants; she must show subsequent acts of jurisdiction, and acquiescence therein by Georgia, in order to perfect her claim. Other than the 1868 deeds which were not recorded until 1930, the only conveyances of record after

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[12] A map showing landholdings of the Barnwell family members after the 1868 deeds was introduced into evidence by South Carolina, S.C. Ex.GM-39, and is attached to the brief as Appendix F, as an aid to understanding the pertinent deeds. Georgia has annotated the exhibit by adding the acreage of the Barnwell tracts, as shown by the deeds or by testimony. While the map gives a date of 1867, it is acknowledged that the exhibit reflects landholdings after the 1868 deeds. T-XIII-143.

the 1813 grant were the Marriage Settlement of 1832, an 1871 mortgage and an 1896 deed, all intra-family transactions. S.C. Ex.B-10(2), (9), (10). None of these documents describes the Barnwell Islands as being in the Savannah River or otherwise in a manner sufficient to identify the area being conveyed to someone outside the family. The 1832 marriage settlement conveys a tract described as "All that tract of land in the district of Beaufort, State of South Carolina, containing between two and three hundred acres bounding . . . north upon lands of . . . Screven, to the east on . . . lands of . . . Procter, . . . to the south on Savannah back river and to the west on lands belonging to John Joyner Smith." S.C. Ex.B-10(2), Appendix F. While the Special Master found that the description in the marriage settlement agreement included the three Barnwell Islands, 1st Report at 55, it also included land on the South Carolina mainland known as Nullification Plantation. 1st Report at 46. The description does not refer to any islands and can easily be read as a description of Nullification Plantation only, since the stream between the islands and the mainland was sometimes referred to as "Savannah Back River." Ga. Ex. 404 (1850 plat of property of J. Screven). At any rate, there is certainly nothing in this description to alert the State of Georgia or anyone else that the parties were treating any islands in the Savannah River as lands in South Carolina.

In 1871, the sons in the Barnwell family mortgaged their interests in the islands (conveyed to them by the then unrecorded 1868 deeds) to their sisters. Here again, the description is insufficient to constitute notice of any claim by South Carolina. The mortgage describes the land by the family nomenclature: "Rabbit Island, Long

Island, . . . and . . . Hog Island Plantation, situate lying and being in Beaufort District in the State of South Carolina. . . ." S.C. Ex.B-10(9). The description refers to the plat which was not recorded until 1930, and also to the 1832 marriage settlement. The deed nowhere states that the islands in question are islands in the Savannah River nor references any known landmark. The published maps do not identify the islands by these names, and while apparently these names were well known among family members, there is no evidence that this nomenclature was widely used outside the family.[13] Other than the plat accompanying the 1868 deeds (not recorded until 1930), there is no link of record between the family nomenclature and these islands in the Savannah River.

In 1896 the brothers conveyed their entire interest in the islands as well as their interest in other family property to their sisters, Charlotte C. and Eliza Ann Barnwell. S.C. Ex.B-10(11). The description is virtually identical to that in the 1871 mortgage, and is similarly inadequate to constitute notice of any claim of South Carolina jurisdiction. Until the recording of the plat in 1930, the reference in the deed to "Hog Island," for example, would have been meaningless to anyone other than family members.[14]

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[13] An isolated instance of use of this nomenclature outside the family is in 1853, on a Corps of Engineers map which identifies the largest island as Hog Island.

[14] "Hog Island" is a common name; for example, there is another "Hog Island" in the Savannah River just upstream from the City of Savannah. Ga. Ex. 176; See also 1st Report at 41 n. 27.

After the 1930 recording of the 1868 deed and plat, the record is again devoid of any recorded conveyances until 1940 when, due to non-payment of taxes, the Sheriff of Beaufort County foreclosed on and sold to the Forfeited Land Commission of Beaufort County certain property of the Barnwell family which South Carolina now claims to be the Barnwell Islands. The Sheriff's deed which conveyed the land of E.A. Barnwell described the land conveyed as

> measuring and containing one hundred fifty two (152) acres, more or less butting and bounding.
> North .....;
> East .....;
> South, bounded by Savannah River cuts, slues (sic) and marshes;
> West .....

S.C. Ex.B-10(13).

This deed would seem to be legally insufficient to convey title to land. "In order to make a valid conveyance the land sought to be conveyed must be capable of identification, and, if the deed does not refer to it with such particularity in the 'description' as to make this possible, the conveyance is void." H. Tiffany, *The Law of Real Property* (abridged) § 511 at 426 (3rd ed. 1970); *see also Carpentier v. Montgomery*, 80 U.S. 480 (1871). Even if the deed would be sufficient under South Carolina law to convey good title, as South Carolina's expert testified, T-XIII-62-64, these deeds are certainly insufficient to constitute notice to Georgia of any South Carolina claim of jurisdiction. To the extent that the description can be read to indicate any particular location, the call on the South of bounded by "Savannah River cuts, slues (sic) and marshes" necessarily excludes the Barnwell Islands,

which are bounded on the south by the mainstream of the Savannah River. Appendix F.

In 1942 the Forfeited Land Commission executed a deed to E.B. Pinckney conveying two tracts of 152 acres each, with each tract described as in the above deed. S.C. Ex.B-10(14). That same deed also conveyed a tract of 1519 acres bounding "North, Wright's Cut; East, Wright's River; South, Wright's River and Mud River; West, Mud River and Savannah River." S.C.- Ex.-B-10(14). This description on its face describes a tract of land known as Denwill, T-XIII-165, the western boundary of which is downstream from and not even contiguous to the Barnwell Islands. Appendix F. The Special Master concludes that by this deed the Beaufort County Forfeited Land Commission conveyed the islands (the western half of Rabbit, 39 acres of Hog Island including Battery Square, and all of Long Island), as well as Denwill, to Pinckney. 1st Report at 52.

Whether this could be sufficient under South Carolina law to convey title to the islands, it surely was not notice to the State of Georgia.

In any inquiry between sovereigns as to their boundaries, questions of private title are of only secondary importance. *New Jersey v. Delaware*, 291 U.S. 361, 372 (1934); 1st Report at 39. In most boundary cases, therefore, such a detailed review of the deeds of record would not be appropriate. However, in this case it is this very evidence of private titles, in conjunction with payment of taxes, upon which the Master relies to find prescription and acquiescence.

The Special Master finds support for South Carolina's prescriptive claim in the taxes paid to Beaufort County by the Barnwell family and later by Pinckney. 1st Report at 52-55 (finding that Rabbit Island, Hog Island and Long Island were reported and assessed for tax purposes in South Carolina from 1870 to 1956 "with some reasonable degree of accuracy and continuity."). Accepting the Special Master's finding that taxes were assessed and paid on the islands, Georgia contends that such actions constituted neither constructive nor actual notice to the State of Georgia.

The tax records themselves contain no information which identifies the property which is reported for taxes. From 1870 tnrough 1933, entries were made in the names of C.C. Barnwell, E.A. Barnwell, Woodward Barnwell and A.S. Barnwell showing certain acreages returned for taxes in Beaufort County. S.C. Ex.B-13. Until the 1930 recording of the 1868 deeds and plats there is no document of record which could lead one examining the records to a deduction that the land reported for taxes was considered to include the Barnwell Islands.

Even after the recording of the deeds and plats in 1930, there is no clear correlation between the acreage reported for taxes and the acreage conveyed by the deeds. For example, in 1896 A.S. and Woodward conveyed to C.C. and E.A. Barnwell property described in the deed as containing 5159.05 acres plus Long Island (no average given). S.C. Ex.B-13. The sisters began paying taxes on 5519 acres in 1899, based on the 1896 deed, 1st Report at 53 n.39, but from 1909 the total acreage returned by the two sisters together is reduced to 1519 acres, S.C. Ex.B-13, although they had not conveyed any

of the property. T-XII-117. South Carolina's expert testified that the Sheriff's deed conveying 1519 acres to the Forfeited Land Commission included not only all of Denwill, described in the most recent deed as containing 5080 acres, but also the brothers' portion of the islands described in the 1896 deed as containing 79.05 acres, as well as an indeterminate acreage for Long Island. T-XIII-164-65. As the Special Master indicates, the record is clear that the taxpayer prepared his own returns and that the auditor of necessity generally accepted the taxpayer's reports, 1st Report at 53, as the county did not have a comprehensive tax mapping system at that time. T-XII-95.

The most that can be deduced from the evidence is that the Barnwell family members paid taxes on the islands and that the Beaufort County authorities accepted those tax payments as being for the islands, and the Special Master so finds. 1st Report at 54-55. But one can justify that finding, if indeed it can be justified at all, only by reference to letters among family members explaining their conduct and to other extrinsic evidence not widely known or available. See T-XII-106, 128-31, 133-36.

In considering a claim of prescription and acquiescence this Court has noted that a state is "not called upon to scrutinize the discourse of those in [the adjoining state] even if in statutory form." *Marine Railway Company v. United States*, 257 U.S. 47, 65 (1921). Much less should Georgia be held to have had notice of the deed and tax records of Beaufort County, South Carolina. In this case, however, even if an official of the State of Georgia had scrutinized the deed and tax records in South Carolina,

Georgia would not have been put on notice of any South Carolina claim to the Barnwell Islands.[15]

The Special Master states that the question of actual cultivation or other activities on the Barnwell Islands is of great importance in determining notice to Georgia of a South Carolina claim. 1st Report at 56. In this respect as well, the record made by South Carolina is thin indeed. Through 1833, the islands remained uncultivated marsh. Ga. Ex. 136. The earliest evidence of activity on any of the Barnwell Islands is indicated by a map prepared in 1848, which shows Hog Island diked and divided into fields, apparently for rice cultivation. Ga. Ex.142, 184. Any rice cultivation which commenced in the 1840's was interrupted by the Civil War; the Barnwells did not recommence rice planting until 1866, S.C. Ex.B-21(1); and the Barnwells abandoned cultivation of their lands along the Savannah River by 1882. 1st Report at 56. There is no evidence that the islands were farmed or cultivated for any purpose after 1882, except that Pinckney ran hogs and cattle on the islands starting in the 1930's. S.C. Ex.B-59, B-60.

The Special Master finds that there was cultivation for 30 to 40 years and that this activity was well known to persons in Georgia. 1st Report at 57-60. Two important facts are overlooked, or de-emphasized, by the Special Master. First, and most important, is the fact that actual

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[15] The Special Master notes that certain deeds were recorded in Chatham County, Georgia, and indicates that such recordings were notice to Georgia, 1st Report at 65. The only deed recorded in Chatham County which mentions the islands is the 1896 deed. S.C. Ex.B-10(11); B-10(22) (Abstract of Title).

cultivation took place during a period when there was nothing in the Beaufort County deed records to indicate that the Barnwells were in possession of the islands pursuant to deeds recorded in South Carolina.[16]

It is also significant that the limited period of actual occupation came in the era when the Barnwell Islands were held by the son-in-law and then by the grandchildren of Archibald Smith, who was a resident of Savannah, Georgia. 1st Report at 42. Archibald Smith owned land both in Savannah and on the South Carolina mainland (Smith's settlement, later known as Blue Mud). 1st Report at 42, Ga. Ex. 397. The Barnwell Islands were sometimes referred to as "Smith's Land". Ga. Ex. 397 (1823 map), Ga. Ex.176 (1875 map). In 1825 and 1831, Archibald Smith and then his estate paid taxes on the islands in Chatham County, Georgia. 1st Report 51 at n.36, 55; Ga. Ex. 398, 401. The Barnwell grandchildren inherited from Archibald Smith (through the trustees of their mother's marriage settlement) property in the City

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[16] The South Carolina grant to Archibald Smith was of record in the South Carolina grant books. S.C. Ex.B-5, B-6. However, the fact that such grant was not widely known and not easy to locate is indicated by the fact that the grant was not introduced by Pinckney in *United States v. 450 Acres of Land*, Ga. Ex. 378, and was not mentioned by South Carolina in its Motion for Leave to File an original action in this Court in 1955. Ga. Ex. 379. The first mention of the state grant to Archibald Smith is set forth in South Carolina's Motion for Leave to file Complaint in 1957. Ga. Ex. 380. Because South Carolina, like Georgia, is a "head right" state, where land was granted without reference to a comprehensive survey, it is very difficult to locate the original grant to any given tract of land, unless one knows the last name of the grantee. T-XIX-74.

of Savannah, on the South Carolina shore, and on the islands. Neither possession nor cultivation of the islands by these heirs of Archibald Smith made any statement that the islands were in South Carolina, rather than in Georgia.

The Special Master goes to great pains to "comb the record" for inferences that persons other than the Smith and Barnwell families had the perception that the Barnwell Islands were in South Carolina. 1st Report at 57-62. Those inferences, separately or together, fail to prove any general perception that the Barnwell Islands were in South Carolina. The references generally deal only with a recognition that the islands were owned first by Archibald Smith and later by his son-in-law Barnwell (actually the land was held by the trustees of the marriage settlement of Eliza Zubley Smith Barnwell but was treated as his property by her husband), or referred to the islands as "on the Carolina side of the Savannah River." *See* 1st Report at 57-62. In several instances the references relied upon are unpublished journals, diaries and books. The reference by Edward Anderson, Mayor of Savannah, to the batteries on Barnwell as "on the Carolina side" of the Savannah River is from an unpublished diary, 1st Report at 59, S.C. Ex.B-41, and the guns on Barnwell Island were obviously "on the Carolina side" of any Union boats which might come up the river to Savannah, a consideration which was of vital importance in maintaining the defense of the city. Dr. Screven's journal, also relied upon by the Master, 1st Report at 58, is similarly unpublished, S.C. Ex.B-39, as is Magnigault's "Records of a Rice Planta-

tion."[17] The Special Master also gives unjustified weight to a manuscript "textbook" written by Charles G. Platen in 1875.[18] 1st Report at 60, S.C. Ex.G-9. Platen drafted the textbook and attempted to market it for use in the schools; there is no evidence that it was ever published. T-XV-166, T-XIX-33. Platen's 1875 map of Chatham County, although published by Platen, Ga. Ex. 461, S.C. Ex.GM-11, was never adopted by the county or any other officials. Ga. Ex. 468. The record contains several different versions of this map, S.C. Ex.GM-11, Ga. Ex. 461, some of which are colored by persons unknown, T-XV-168, which vary from version to version. One version shows color to indicate that Long Island and the adjacent naval battery are in Chatham County, Georgia. Ga. Ex. 461, Ga. Ex. 462. While the version introduced by South Carolina has no color on any of the Barnwell Islands, indicating they are not in Chatham County, S.C. Ex.GM-11, that same map also lists the Naval Battery adjacent to the islands as a "place of historic interest" in Chatham County, Georgia. Ga. Ex. 462.

The claim of South Carolina prescription and Georgia acquiescence is contradicted by considerable evidence that Georgia and United States officials understood that

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[17] The Special Master is mistaken when he finds that Magnigault "published" his "Records of a Rice Plantation," which lists Barnwell "on the Carolina side." 1st Report at 58. The record is clear that this is an unpublished manuscript. S.C. Ex.B-79.

[18] The Special Master is mistaken when he finds that the Platen textbook was "published." 1st Report at 60. The record is clear that the document in evidence is an unpublished manuscript; there is no evidence that it was ever published. T-XV-166.

the islands were in Georgia. In 1760 the two islands then in existence were granted by Georgia, Ga. Ex. 94, 95, 96, although no chain of title follows from the grant. 1st Report at 40 n.26.[19] In 1825, 1830, and 1831, property taxes were paid to Chatham County, Georgia by Archibald Smith and his estate on the largest of the Barnwell Islands. 1st Report at 51 n.36; Ga. Ex. 398, 401. A survey of the batteries on both sides of the river by the U.S. Coast Survey in 1866 described the battery on the largest Barnwell Island as being in Georgia. Ga. Ex. 163.

There is no 19th century map which shows a boundary line between the two states, but the earliest map with a boundary line, a U.S. Department of Agriculture Soil Map of Chatham County (1911), shows the Barnwell Islands, other than Rabbit Island, in Georgia, Ga. Ex. 424, as does a 1920 quadrangle map published by the U.S. Army Corps of Engineers. Ga. Ex. 425. County highway maps issued by the State Highway Board of Georgia starting in 1940 consistently show Barnwell Island (other than Rabbit) in Georgia. Ga. Ex. 426 (1940), 427 (1953), 428 (1960), 429 (1965), 431 (1961). Most maps issued by the U.S. Army Corps of Engineers, the federal agency most actively involved in the Savannah River area, and by the U.S. Geological Survey show the Barnwell Islands (except Rabbit) as being on the Georgia side of the boundary line. Ga. Ex. 433 (1932, reprinted 1959), 434

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[19] While the grant itself from the Colony of Georgia to Edmund Tannatt in 1760 was not recorded, there are official records of the issuance of the grant, Ga. Ex. 95, 96; the Master is mistaken in stating, 1st Report at 40, that the plat was never recorded. Ga. Ex. 94 (Plat Book C, p. 375).

(1963, 1970 ed.), 435 (1970), 436 (1957), 437 (1974), 219 (1971). A 1917 U.S. Coast and Geodetic Survey publication listing triangulation stations in Georgia identified the station on Barnwell Island as being in the State of Georgia. Ga. Ex. 421, 422. In contrast, South Carolina county highway maps for Beaufort County show the Barnwell Islands in South Carolina, S.C. Ex.GM-13 (1937), GM-15 (1959), GM-16 (1969), as does a sketch of the Georgia coast in a publication of the Georgia State Planning Board in 1939, S.C. Ex.GM-14, a photo-mosaic of the coastal area published by the Georgia Highway Department circa 1961, S.C. Ex.GM-29, and a set of aerial photos published by the U.S. Soil Conservation Service in 1965, S.C. Ex.GM-17. However, as recently as 1980, the U.S. Department of the Interior and the South Carolina Wildlife and Marine Resources Department jointly published an atlas in which certain maps showed Barnwell Islands in Georgia. Ga. Ex. 467.[20]

The short duration of actual possession, the limited South Carolina official acts, and the paucity of published or recorded documents referring to the islands as being in South Carolina fall far short of the open, notorious and continuous possession required by the Court to establish a boundary by prescription. *See, e.g., Arkansas v. Tennessee*, 310 U.S. 563 (1940); *Michigan v. Wisconsin*, 270 U.S. 295 (1926). This is especially true since the Barnwell Islands (except Rabbit Island) continued to be islands in the

[20] These maps, as well as other acts and documents evidencing jurisdiction in either Georgia and South Carolina are set forth in the Barnwell Island Chronology attached as Appendix E.

Savannah River until well into the 20th century, Appendices C and D, and since South Carolina has continued to recognize officially the Treaty of Beaufort provision that all islands in the Savannah River are in Georgia,[21] as the 1922 decision of the Court reaffirmed.

This is not a case where a State can be held to have acquiesced in an agreed-upon boundary line or a survey later found to be erroneous, as in *California v. Nevada*, 447 U.S. 125 (1980), *Maryland v. West Virginia*, 217 U.S. 1 (1910), or *Virginia v. Tennessee*, 148 U.S. 503 (1893). Rather, South Carolina seeks to have the Court declare that Georgia has acquiesced in a boundary line contrary to that agreed upon by the States and reaffirmed by the Court.

II.

IN THE AREA OF OYSTER BED ISLAND AND THE MOUTH OF THE RIVER, THE SPECIAL MASTER HAS MISTAKENLY LOCATED THE BOUNDARY IN THE NAVIGATION CHANNEL RATHER THAN IN THE GEOGRAPHIC MIDDLE AS REQUIRED BY THE DECISION IN *GEORGIA V. SOUTH CAROLINA*, 257 U.S. 516 (1922).

In the area upstream from and west of Oyster Bed Island, the Special Master correctly locates the boundary midway between the 1855 South Carolina shore (Jones

[21] The decision of *Boney v. Trans-State Dredging Co.*, 237 S.C. 54, 115 S.E.2d 508 (1960), holding that the South Carolina courts had jurisdiction over a corporation performing dredging operations in the Savannah River, noted that "(T)he Savannah River, the middle of which (except where there are islands, and in that case a line midway between the island bank and the South Carolina shore) is the boundary between Georgia and South Carolina." 115 S.E.2d at 512 (citations omitted).

Island) and the Georgia islands, see Appendix B, recognizing as he does that the area of land between Jones Island and Oyster Bed Island (sometimes referred to as Horseshoe Shoal) is land created by the avulsive actions of the U.S. Army Corps of Engineers. 1st Report at 94. However, at the point opposite the southern point of Turtle Island, the recommended boundary departs from the geographic middle of the northernmost stream of the river and makes an abrupt jog to reach the navigation channel of the river, thereby placing Oyster Bed Island in South Carolina, rather than in Georgia. The recommended boundary then proceeds eastwardly in the navigation channel to the closing line. Appendix B. Georgia submits that the segment of the Special Master's recommended boundary in the area of Oyster Bed Island and the mouth is directly contrary to the holding in *Georgia v. South Carolina* and has no support either in law or in the facts.

A. Oyster Bed Island lies south of the geographic middle of the northernmost stream of the river.

Oyster Bed Island emerged as an island in the 1870's or 1880's. 1st Report at 93. Georgia contends below at 52 that all newly-formed islands are in Georgia; if the Court so rules, Oyster Bed Island is necessarily in Georgia, as the Special Master recognizes, 1st Report 88 & n.68, and the boundary would be midway between Oyster Bed Island and Turtle Island, South Carolina.

Even if newly-formed islands in the river are not necessarily in Georgia, Oyster Bed Island lies south of the geographic middle of the northernmost stream of the

river (running between Cockspur Island, Georgia and Turtle Island) and thus must be in Georgia.[22] As can be seen by reference to Appendix B, if the Master had continued the recommended boundary line midway between the Georgia shore (Cockspur Island) and the pre-avulsion South Carolina shore (Turtle Island) until the boundary line passed east of Cockspur Island, Oyster Bed Island would be south of the boundary line and in Georgia. To avoid that result, the Master drew a straight line at a southeast angle to place the boundary in the navigation channel. The Report provides no explanation of the straight-line segment and an inadequate justification for a boundary in the modern day navigation channel.

It is clear that Oyster Bed Island was an island *in* the Savannah River, not north of the Savannah River, for in the 1870's a major navigation channel of the river ran north of Oyster Bed Island. 1st Report at 94-95, Ga. Ex. 195 (1871 "Sketch showing examination of the north channel Savannah River" by the Corps of Engineers), 207 (1880 Corps of Engineers chart showing "old channel" north of Oyster Bed and "channel now used" south of it), 208, T-IV-500, T-VIII-949. In 1890, the Corps of Engineers reported that nearly equal volumes of water flowed north

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[22] In 1926-31 the Corps of Engineers installed a line of hydraulic fill to link Jones Island to Oyster Bed Island. Ga. Ex. 320 (Appendix C to 1st Report); Ga. Ex. 330; T-VIII-940, 963-64, 965-66. Construction of this fill did not work any change in the boundary, as the Master acknowledges by recommending a boundary in the geographic middle of the northernmost stream based on the 1855 pre-avulsion map, which recommended boundary line crosses onto the fill area between Jones Island and Oyster Bed Island. Appendix B; 2nd Report App. D.

and south of Oyster Bed. Ga. Ex. 297, T-XVI-129-30. The Corps blocked the flow north of Oyster Bed Island by a training wall and later a wall of hydraulic fill in order to capture that water and force it into the navigation channel south of Oyster Bed. Ga. Ex. 316, 330, T-VIII-939.

In addressing the boundary in the area of Oyster Bed Island, the Special Master has assumed that "The issue for determination relates to where the vessels customarily traversed the area in 1787 when the Treaty was executed." 1st Report at 94. Review of the decision in *Georgia v. South Carolina* makes clear the fallacy of that proposition. According to the Court's opinion, "where there are islands" (and Cockspur Island is clearly an island in the Savannah River and undisputedly in Georgia) "the line is midway between the island bank [Cockspur] and the South Carolina shore [Turtle Island]." 257 U.S. at 523. The Court there held that the boundary is unaffected by consideration of issues such as the thalweg or main navigation channel. 257 U.S. at 522. Diversion by the Special Master from the geographic middle into the navigation channel clearly contravenes the Court's earlier decision, and the Master has in no way justified this departure from the established boundary.

The Special Master does not base his recommendation concerning Oyster Bed Island on prescription and acquiescence as claimed by South Carolina. Indeed he acknowledges, 1st Report at 98, as the record fully shows, that Georgia alone has exercised dominion and control over Oyster Bed Island, ceding it to the United States in 1820 for a beacon site, Ga. Ex. 118; operating a customshouse and quarantine station on the island in the 1880's

and early 1890's, Ga. Ex. 182, 206, T-IV-501-503; and constructing and operating a barge unloading facility in the river adjacent to Oyster Bed Island in the 1970's. Ga. Ex. 373, 374, 375, 376, 377.[23] In 1938, the United States formally designated Oyster Bed Island as the Tybee Migratory Bird Refuge, Georgia, basing federal ownership on the 1820 cession from Georgia, Ga. Ex. 369, 370, 371; the island continues to be operated as a federal wildlife refuge. Ga. Ex. 3, 372, T-XVIII-123.[24]

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[23] The line recommended by the Special Master runs just east of the barge unloading facility and would thus place it in Georgia. 2nd Report App. D.

[24] The Special Master seeks to discount the considerable evidence of Georgia dominion over Oyster Bed Island by reference to a stipulation of the parties. The stipulation recites that Georgia does not contend that any area in dispute is in Georgia "by virtue of prescription and acquiescence *in derogation* of the Convention of Beaufort." 1st Report at 99 (emphasis added). Moreover, the third paragraph of the stipulation, not quoted by the Special Master, states that Georgia contends that Georgia "has asserted jurisdiction over each area pursuant to the provisions of the Convention of Beaufort." If and to the extent that the location of the boundary in the area of Oyster Bed Island is not clearly spelled out by the Treaty of Beaufort as construed in *Georgia v. South Carolina* (a proposition with which Georgia does not agree), the open notorious continuous and undisputed acts of Georgia in exercising dominion over Oyster Bed Island should be used by the Court as an aid in the proper construction of the Treaty. *See Vermont v. New Hampshire*, 289 U.S. 593, 613 (1933); *Michigan v. Wisconsin*, 270 U.S. 295, 316-19 (1926); *Louisiana v. Mississippi*, 202 U.S. 1, 53 (1906). The limited terms of the stipulation did not authorize the Special Master to disregard the evidence of Georgia governmental activities on and relating to Oyster Bed Island. Interstate boundary disputes

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B. The boundary in the mouth of the Savannah River is the geographic middle between the Georgia shore and the South Carolina shore.

By the terms of Article I of the Treaty of Beaufort the boundary is "The most northern branch or stream of the River Savannah *from the sea or mouth of such stream . . . .*" Appendix A (emphasis added). As discussed above at 6, the navigation channel has no influence on the boundary, because the treaty guaranteed to South Carolina the right to "navigation of the River Savannah at and from the bar and mouth along the northeast side of Cockspur Island . . . .", Art. II, Appendix A, and upstream, "irrespective of the location of the navigable channel with respect to the boundary line." *Georgia v. South Carolina*, 257 U.S. at 521.

Rather than locating the boundary in the mouth of the river by determining the geographic middle with reference to points in South Carolina (Turtle Island, Daufuskie Island and Hilton Head) and points in Georgia (Oyster Bed Island or Cockspur Island, and Tybee Island), the Special Master has recommended a boundary in the navigation channel eastward to the closing line between Hilton Head and Tybee. 1st Report at 112, App. F; Appendix B (showing the Master's recommended boundary and Georgia's position). This recommendation conflicts with the decision in *Georgia v. South Carolina*, is not consistent

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should not be decided based on technicalities of pleadings. *Virginia v. West Virginia*, 220 U.S. 1, 27 (1911); *Kansas v. Colorado*, 185 U.S. 126, 146-47 (1902); C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* § 4052 at 258 (1988).

with the Treaty of Beaufort, and is contrary to general principles of law.

The Special Master's recommendation seems to be based on a finding that the term "mouth" of the river as used in the Treaty of Beaufort referred to the area where the deep water channel of the river, as delineated by submerged shoals on either side, meets the sea. 1st Report at 104, 108-09, 110-12, App. F. The Special Master clearly concludes that the framers of the treaty did not intend for the boundary to follow the meanderings of the sailing channel as it existed in 1787. 1st Report at 111. Rather, he has drawn the boundary on the northern edge of the modern-day navigation channel, which is maintained by the Corps of Engineers through regular dredging. 2nd Report, App. D, T-II-375.

In locating the boundary in the mouth of the River, the language of the Treaty of Beaufort is quite significant. Article I establishes the boundary in "the most northern branch or stream of the River Savannah *from the sea or mouth* of such stream . . . ," while Article II guarantees the free right to "the navigation of the River Savannah, at and *from the bar, and mouth,* along the northeast side of Cockspur Island, and up the direct course of the main northern channel . . . ." Appendix A (emphasis added). The fact that the framers penned two separate articles containing two different descriptions makes it clear that the channel guaranteed for navigation was not the same as the boundary channel. *Georgia v. South Carolina*, 257 U.S. at 521. In the area of the mouth of the river, in particular, the terms of description are critical: the free right of navigation is assured "from the bar and mouth," referring to the main navigation channel; in contrast, the

boundary is delineated "from the sea or mouth", a different and broader concept than the main track of navigation.

Although the term "mouth" is not defined in the Treaty of Beaufort, the contemporaneous references indicate that the "mouth" is formed by opposite points of land, rather than by submerged shoals. Both Georgia and South Carolina agreed, and the evidence was very clear, that the mouth as referred to in the treaty must be located in the vicinity of Tybee Island, rather than further upstream in the Turtle Island – Cockspur Island area. Virtually all the historic references to the mouth mention Tybee. *See, e.g.,* 1st Report at 105, 108 n.92. But Tybee is on the south side of the mouth, and some feature must form the northern side of the mouth. It is Georgia's position that the mouth of the Savannah River, as understood at or near the time of the Treaty of Beaufort, was formed by Tybee Island on the south and Hilton Head Island on the north. Key evidence in support of this position came from General Oglethorpe, the founder of the Colony of Georgia, who referred to Hilton Head Island which "lies at the mouth of the Savannah River on the Carolina side," Ga. Ex. 65, and A. D. Bache, Superintendent of the U. S. Coast Survey who described "Tybee Inlet" as "the entrance to Savannah River, and is 5 1/4 nautical miles wide, between Hilton Head Island on the north and Tybee Island on the south . . . ." Ga. Ex. 158.

The Special Master's delineation of the mouth with reference to submerged shoals, 1st Report App. F, does not comport with logic or law. The term "mouth" of a river derives, of course, from the mouth of an animal,

which is an opening with discernible sides.[25] Since the essential characteristics of any river are the bed, the water, the banks or shores, and a current, J. Gould, *Law of Waters* § 41 at 98 (3rd ed. 1900); *see also* H. Farnham, *The Law of Waters and Water Rights* § 417 at 1462 (1904); *Howard v. Ingersoll,* 54 U.S. 381 (1851), it follows necessarily that the mouth of a river must also have banks or shores. Expressing the universally accepted principles of international law, Article 13 of the Geneva Convention provides that "If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks." Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639. In England the boundaries between adjoining parishes are determined *"ad medium filum acquae* down to the point where the river enters the sea level at low water mark." H. Coulson and U. Forbes, *The Law Relating to Waters by H. F. Stuart Moore* 89 (4th ed. 1924). This Court has

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[25] *A Dictionary of the English Language* by Samuel Johnson (11th ed. 1816) defines mouth as follows:

1. The aperture in the head of any animal at which the food is received. * * *

2. The opening; that at which anything enters; the entrance; the part of a vessel by which it is filled and emptied. * * *

"The mouth is low and narrow; but, after having entered pretty far in, the grotto opens itself in an oval figure". Addison.

"The navigation of the Arabick (sic) gulf being more dangerous toward the bottom than the mouth, Ptolemy built Berenice at the entry of the gulf." Arbuthnot On Coins.

referred to the "universal rule governing the measurement of waters" that "where a water of a larger dimension is intersected by a water of a smaller dimension, the line of measurement of the first crosses the latter at the points of junction, from headland to headland." *Knight v. U. S. Land Association*, 142 U.S. 161, 207 (1891) (Field, J., concurring), cited in *Phillips Petroleum Co. v. Mississippi*, No. 86-870, slip op. at 6 (U.S. Feb. 23, 1988) (O'Connor, J. dissenting).

In a number of decisions this Court has recognized that a mouth of a geographical feature, whether a river or a bay, is to be located with reference to points of land above low water mark. *See, e.g., United States v. California*, 382 U.S. 448, 450 (1966) ("inland waters" include "[a]ny river or stream flowing directly into the sea, landward of a straight line across its mouth. . . ."); *United States v. Louisiana*, 394 U.S. 1, 56 (1969) (a "mouth [in a bay] caused by islands is [not] to be located in a manner any different from a mouth between points on the mainland – that is, by 'a line joining the low-water marks of [the bay's] natural entrance points,' " citing from Article 7(3) of the Geneva Convention.); *id.* at 38, 40 (refusing to use the ends of the dredged navigation channels extending into the Gulf of Mexico as headlands or as a channel comprising part of "inland waters" within the definition of the Submerged Lands Act of 1953, 43 U.S.C. § 1301, *et seq.*). In *Washington v. Oregon*, 214 U.S. 205 (1909), the Court refused the State of Washington's request to delineate the interstate boundary in the mouth of the Columbia River by reference to the underwater features forming the ship channel. *Id.* at 206-07, 214.

Although the "mouth" of a river is sometimes difficult to locate,[26] the ordinary understanding of mouth of a river today, as in the 18th century, is the "opening between the seawardmost points of land at which the shore 'turns' as the River flows into the ocean." Report of Special Master Tom C. Clark in *New Hampshire v. Maine*, No. 64, Orig., at 33-34.[27] In the absence of other established criteria, the "headland-to-headland" principle is used in defining the limits of bays and rivers. 2 A. Shalowitz, *Shore and Sea Boundaries* § 141 at 367 (1964).

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[26] One expert has written: "It is likewise fallacious, and dangerous in boundary-making to assume that a river has a mouth which is a precise point. Some rivers have no mouths, sinking in desert sands or losing themselves in swamps. Others have several mouths entering the sea through deltas. Many important navigable rivers are of this type. Even those rivers with a single embouchure give trouble to the boundary-maker. The mouth is an area, not a point. Also, it may be questioned whether the mouth-area lies at the head of the estuary or bay or at the entrance into the estuary or bay from the seas. In short, the same recommendations apply to mouths as to sources: if possible, a precise point should be defined; failing that, 'a convenient point near the mouth' may be stipulated.

"The mouth of a navigable river is often its most important part, yet there may be less natural indication of where the boundary should lie than along the course of some remote non-navigable tributary. If the river ends in a delta, there may be several mouths, perhaps no principal mouth, and new mouths may be opened and old ones abandoned."

S. Jones, *Boundary-Making: A Handbook* 130 (1945) (footnotes omitted).

[27] This boundary dispute was resolved by consent agreement, rather than on the basis of the Report. *New Hampshire v. Maine*, 426 U.S. 363 (1976).

While the thalweg has sometimes been used to locate a boundary in an estuary, *see, e.g., Louisiana v. Mississippi*, 202 U.S. 1, 50 (1906), such use has been authorized only when no other boundary has been specified by treaty or law. *New Jersey v. Delaware*, 291 U.S. 361, 383 (1934); *Texas v. Louisiana*, 410 U.S. 702, 710 (1973). In this case the Treaty of Beaufort has been interpreted by the Court to prescribe a boundary in the geographic middle, rather than the thalweg. Moreover, the Court has recognized that the doctrine of the thalweg was not authoritative doctrine prior to 1892, *Texas v. Louisiana* 410 U.S. at 709 n.6, and that it had only a "germinal existence" in the late 18th century. *New Jersey v. Delaware*, 291 U.S. at 381-83.[28]

Indeed it seems highly unlikely that the framers of the treaty could have intended the boundary in the "mouth" of the Savannah River to be determined by where the Corps of Engineers chose to locate the navigation channel by construction of jetties and dredging. *See New Hampshire v. Maine*, 426 U.S. at 371 (White, J. dissenting). It is clear that the fixed high ground of Tybee Island was the abiding reference point for location of the mouth; in accordance with the Treaty of Beaufort as construed by this Court, the international law of the period, and the geography at the time of the treaty, it seems appropriate

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[28] Prior to the Court's adoption of the doctrine of the thalweg in *Iowa v. Illinois*, 147 U.S. 1 (1892), the geographic middle rule had been widely accepted. *New Jersey v. Delaware*, 291 U.S. at 381 n.5. This rule was applicable to estuaries and bays as well as to rivers. H. Farnham, *supra*, § 5 at 27 ("Two counties lying on the opposite sides of a bay or sound . . . have title each to the center.").

that the boundary in the mouth must be the geographical middle between Tybee and the closest points of land in South Carolina – Daufuskie Island and Hilton Head Island.[29] Instead of locating the boundary in the geographic middle, the Special Master has laid a ruler on the map and drawn straight line segments to reach and to stay in the modern-day dredged navigation channel. 1st Report, App. F. This arbitrary and simplistic solution[30] is clearly erroneous and should be corrected.

III.

THE "RIGHT-ANGLE PRINCIPLE" USED BY THE SPECIAL MASTER IS INCONSISTENT WITH THE GEOGRAPHIC MIDDLE PRINCIPLE PRESCRIBED BY THE COURT IN *GEORGIA V. SOUTH CAROLINA*, 257 U.S. 516 (1922).

The Special Master has recommended use of a "right-angle principle" in demarcating the boundary line around islands in the Savannah River. 1st. Report at 23, 112. The

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[29] The geographic middle of the Savannah River mouth can be determined by the principles used to determine the geographic middle of rivers, bays, lakes and other bodies of water – a line every point of which is equidistant from the nearest points on opposite shores. 2 A. Shalowitz, *supra*, § 1422 at 374. This method is discussed below, at 50-51.

[30] In *New Hampshire v. Maine*, the Court approved a proposed consent decree which established the boundary by straight-line segments. The dissent objected to approval of the settlement, contending that the boundary should be determined in accordance with accepted legal principles, as the Master had recommended. 426 U.S. at 372. It must be clear that a straight line boundary placed for convenience in the modern navigation channel cannot be adopted by this Court *without* the consent of the parties.

recommendation of the Special Master, if adopted by this Court, would establish a method of demarcation for the entire boundary between Georgia and South Carolina. Being clearly erroneous, his recommendation in this regard requires correction.

It was established by the Court that the boundary is the geographic middle of the river where there are no islands and that, where there are islands, the line is midway between the island bank and the South Carolina shore. *Georgia v. South Carolina*, 257 U.S. at 523. A line midway between the banks of a river is known as the *medium filum acquae*, 2 A. Shalowitz, *supra*, § 1422 at 374, also referred to as the geographic middle. *Texas v. Louisiana*, 410 U.S. 702, 707 (1973). Such a boundary line is median line, every point of which is equidistant from the nearest points on the opposite shores. *New Hampshire v. Maine*, 426 U.S. 363, 371 (1976) (White, J. dissenting); 2 A. Shalowitz, *supra*, § 1422 at 374 n.30. The method of delineating the median line is well established. 1 A. Shalowitz, *supra*, § 2212 at 230-35. With accurate maps at a proper scale, a median line can be precisely and geometrically drawn in a boundary river.

Where there are islands in the Savannah River (and there are islands throughout the stretch of the River at issue here), the median line in the island stream, midway between the island and the South Carolina shore, will intersect the median line in the river at a point which is tri-equidistant from the South Carolina shore, the island shore, and the Georgia mainland shore, or as in this case, the shore of another Georgia island. S. Boggs, *International Boundaries: A Study of Boundary Functions and Problems* 183 (1966) ("The allocation of all of the islands

having been determined, a median line may then be drawn midway between the islands, or between islands and mainland, simply by developing a line equidistant from the nearest points of territory of the two sovereigns.") Using such a principle, the boundary will at all times be equidistant from the closest point in Georgia and the closest point in South Carolina. Only a boundary delineated by such a principle is consistent with the decision of the Court in *Georgia v. South Carolina*.

The fact that the Master's "right-angle principle" results in a boundary which is on its face inconsistent with the 1922 decision is demonstrated by reference to Appendix F to his Second and Final Report in the area of Pennyworth Island, an island indisputably in Georgia. As recommended by the Special Master, the boundary line turns at a right-angle after it clears the eastern end of Pennyworth Island and "reverts back to the midway point between the main banks of the river" 1st Report at 33, App. F; 2nd Report, App. D. The Special Master's recommended boundary touches the very shore of Pennyworth Island, Georgia, and is ipso facto not "midway between the island bank and the South Carolina shore" as required by this Court. 257 U.S. at 523.

This "right-angle principle" was apparently invented by the Special Master, for he cites no authority in support of it.[31] His recommendation in this regard displays his

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[31] Acknowledging that there is no legal support for such a principle, the Special Master apparently concluded that such a method of demarcation was necessary in order to comply with

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clear misunderstanding of the concept of a boundary in the geographic middle as established in *Georgia v. South Carolina*.

IV.

ISLANDS OF NATURAL FORMATION ARE IN GEORGIA EVEN IF THEY EMERGED AFTER THE TREATY OF BEAUFORT OF 1787.

The Special Master has recommended that islands emerging after 1787 be treated differently from all other islands in the Savannah River and that such islands are not in Georgia if they emerge on the South Carolina side of the geographic middle of the northernmost stream, measured prior to emergence of the newly formed island. 1st Report at 33, 112. Georgia contends that all islands are in Georgia, whether formed prior to or after the Treaty of Beaufort, unless created by avulsion. A decision upholding Georgia's position is demanded by the language of the Treaty of Beaufort, as construed in *Georgia v. South Carolina*, and as codified in South Carolina statutes.

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the decision in *Georgia v. South Carolina* (1922). 1st Report at 23. Although there is certainly nothing in the opinion which supports that proposition, the Special Master gleans support from the fact that the record discloses that Georgia requested the Court to rule that when the stream is broken by an island or islands, the line "deflects" from the thread of the mainstream around the island, *Georgia v. South Carolina*. No. 16 Orig., Oct. Term, 1921, Brief of the Complainant at 30, and the fact that the Supreme Court's opinion did not follow this request. 1st Report at 24. It is hardly accurate to say, as the Special Master does, that "the Supreme Court rejected this request." 1st Report at 29. Rather, the opinion of the Court simply did not address this issue.

This issue is determinative of the question of Oyster Bed Island, 1st Report at 88 n.68, as well as unnamed islands upstream and downstream from Pennyworth Island, and is of importance in resolving the jurisdictional location of the Barnwell Islands. Moreover, this issue may, now or in the future, be of significance in other stretches of the boundary not at issue here.

The Treaty of Beaufort places the boundary in the northernmost branch or stream of the river, reserving all islands to Georgia. Unless newly-formed islands are all in Georgia, the boundary between Georgia and South Carolina would digress from the most northern branch or stream of the river. For example, in the area of the unnamed island upstream from Pennyworth Island, the Special Master's recommended boundary line is not in the most northern stream of the river but is, instead, in the stream of the river lying between the unnamed island and Hutchinson Island, Georgia. Appendix B; 2nd Report App. D. This recommended boundary is clearly inconsistent with the controlling language of the Treaty of Beaufort.

The Special Master's recommended treatment of newly formed islands is also inconsistent with the decree in *Georgia v. South Carolina*, which ordered as follows:

> That all islands *formed by nature* in the Chatooga River are reserved to Georgia as completely as are those in the Savannah and Tugaloo Rivers.

259 U.S. 572 (emphasis added).

The 1922 decision and decree do not distinguish between islands formed prior to and after 1787. Rather, the only qualifier placed upon the term "all islands" is

solely to distinguish between islands "formed by nature," as opposed to islands formed by actions of man. The Special Master gives no weight to the "islands formed by nature" language in the decree in 1922, stating that upon his examination the record does not reveal whether these words were executed for "any specific purpose." 1st Report at 22-23 n.15. The record does reveal, however, that the Court directed counsel to present a decree, 257 U.S. at 523, that a decree was entered which referred to "all islands formed by nature," 259 U.S. 572, and that the record reflects no objection to that language. The compelling inference is that the words were inserted thoughtfully and deliberately and that they reflect the parties' and the Court's mutual understanding regarding the boundary.[32]

South Carolina clearly agreed with the decree in this regard, for the exact language, "islands of natural formation," has been incorporated into South Carolina statute:

> [A]nd when the rivers are broken by islands *of natural formation* which, under the Treaty of Beaufort, are reserved to the State of Georgia, the line is midway between the island banks and the South Carolina banks when the water is at ordinary stage.

S.C. Code Ann. § 1-1-10 (1986) (emphasis added).

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[32] The Special Master is doubtless correct that the language means that formation of a man-made island would not change the boundary. 1st Report at 23 n.15. However, since man-made islands were not a factor until the late 19th and early 20th centuries, the language necessarily refers to formation of islands in the post-1787 era.

The Special Master's erroneous holding that newly-formed islands are *not* in Georgia is based primarily on *Texas v. Louisiana*, 410 U.S. 702 (1973), 1st Report at 17-19; his concern that to hold that newly formed islands are in Georgia would effectively grant to Georgia the entire river bed, 1st Report at 20; and the general principle of law that newly formed islands belong to the owner of the bed. 1st Report at 26. None of the stated bases supports the Master's recommendation in this regard.

Texas v. Louisiana is simply not applicable to the present case because the boundary between Texas and Louisiana is the geographic middle of the boundary waters – Sabine Pass, Sabine Lake and Sabine River – irrespective of islands. 410 U.S. at 709. The dispute over islands in the western half of the Sabine River dealt only with title and ownership and not with location of the boundary. *Id.* at 712, 714.

In contrast, in the present case the boundary is located with reference to, and on the South Carolina side of, any islands. If, as the Special Master recommends, newly formed islands are located in South Carolina if they form on the South Carolina side of the geographic middle of the northernmost stream as it existed prior to emergence of the island, then the boundary no longer comports with the operative language of the Treaty of Beaufort, which requires that the boundary be in the northernmost stream or branch.[33]

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[33] Counsel are aware of no other State boundary in which the location of islands is determinative. State river boundaries are, with the exception of Georgia/South Carolina, located

(Continued on following page)

The Special Master is correct that the result of a ruling that all newly formed islands of natural formation are in Georgia would be that South Carolina would "lose" some portion of river bed previously within her boundaries. 1st Report at 25. This concern should be given no great weight. Whenever the boundary is a river subject to change with the natural processes of accretion and erosion, the boundary is ambulatory and necessarily results in some portion of river bed changing location from one side of the interstate boundary to the other. *See, e.g., Louisiana v. Mississippi,* 466 U.S. 96 (1986). Either state stands to lose river bed as a result of natural changes in the river; likewise, each state has the potential of acquiring additional river bed as a result of accretion and erosion.[34] For example, if an island existed in 1787 but was subsequently eliminated by gradual erosion, the boundary would be moved to the advantage of South Carolina, and river bed previously owned by Georgia would then be owned by South Carolina. The holding of the Special Master leads to the anomalous result that the boundary moves with accretion and erosion at any point along the boundary stream, except for accretion which

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(Continued from previous page)

with reference to the thalweg, *see Ohio v. Illinois,* 147 U.S. 1 (1893); geographic middle, *see Texas v. Louisiana,* 410 U.S. 702, 709-711 (1973); the bank, *see Howard v. Ingersoll,* 54 U.S. (13 How.) 381 (1851); or middle of the widest channel, *Washington v. Oregon,* 211 U.S. 127 (1908).

[34] This accepted principle is analogous to the rule that private riparian proprietors hold their title subject always to the possible gain or loss resulting from the natural forces of the river. *See, e.g., County of St. Clair v. Lovingston,* 90 U.S. (23 Wall.) 46, 68 (1874).

results in a newly-formed island in the boundary stream.[35]

The Special Master also relied upon the general common law proposition that a newly formed island belongs to the owner of the river bed where the island arose. 1st Report at 28. With this principle Georgia, of course, does not disagree. After the American Revolution, the thirteen original States succeeded both to the Crown's title to the beds underlying navigable rivers and to its sovereignty over that property. *Mumford v. Wardwell,* 73 U.S. (6 Wall.) 423, 436 (1867); *Martin v. Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842). Each State owns absolute title to the bed of the Savannah River lying within its boundaries, subject to the federal navigational servitude, *see South Carolina v. Georgia,* 93 U.S. 4 (1876), and subject to any conveyances of the bed made pursuant to state law. *See, e.g. Arkansas v. Tennessee,* 246 U.S. 158, 176 (1918). Each State's ownership of the bed of the Savannah River is subject to disfeasance or enlargement if and to the extent the boundary moves

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[35] While the First Report is not entirely clear on this point, it appears that the recommended boundary is the geographic middle as it existed in 1787, as modified by subsequent accretion and erosion but not affected by avulsion. 1st Report at 23-24. Because the northern bank of the Savannah River was created by avulsive actions of the Corps of Engineers, the Special Master has located the recommended boundary with reference to the 1855 pre-avulsion shore. 1st Report at 71-72 n.54. While Georgia earlier asserted an alternative position that the boundary was fixed as of 1787, irrespective of later accretion and erosion, Georgia believes that the Special Master has adopted the better rule and takes no exception to the recommendation in this regard. *Cf. Ohio v. Kentucky,* 444 U.S. 335 (1980).

with accretion and erosion.[36] The question as to ownership of lands newly created in and adjacent to a boundary river must be determined without encroaching upon the interstate boundary. *See Arkansas v. Tennessee*, 246 U.S. 158, 176 (1918) ("[T]hese dispositions [of the former bed of the Mississippi River] are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located.") The Special Master erred by analyzing first the question of title, and making the location of the interstate boundary dependent upon that determination. The correct method is to locate the boundary with reference to the relevant treaty document, in this case the Treaty of Beaufort; questions of ownership can then be determined by operation of the State law which is applicable.

In cases where the boundary is the thalweg, an island must necessarily emerge on one side or other of the navigable channel; an island belongs to the State on whose side of the boundary it emerges. *Kansas v. Missouri*, 322 U.S. 213 (1944). This rule should not control, however, where the boundary line itself is shifted as a result of natural emergence of an island. If, as Georgia contends, emergence of a newly formed island relocates the boundary, at the time of emergence, to the geographic middle of the channel between the newly formed island and the South Carolina shore, then the island is both within the

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[36] This is consistent with the State's ownership of the bed vis-a-vis the private riparian land owners; the State's absolute title to the bed is subject to enlargement or diminution resulting from erosion or accretion, according to the law of each State. *See Oregon v. Corvallis Sand and Gravel Company*, 429 U.S. 363, 378 (1977).

boundaries of the State of Georgia and owned by the State of Georgia. The Special Master's citation of the general proposition of law that the island belongs to the owner of the bed simply does not address the question whether emergence of such island adjusts the location of the boundary.

As the Special Master acknowledges, if he was in error on this point, then the unnamed islands upstream and downstream from Pennyworth Island are in Georgia, as is Oyster Bed Island[37] near the mouth of the river. In addition, this point is relevant to the Barnwell Island area, where two of the Barnwell Islands emerged naturally from the Savannah River after 1787.[38]

V.

THE LATERAL SEAWARD BOUNDARY SHOULD COMMENCE IN THE GEOGRAPHIC MIDDLE OF THE MOUTH OF THE SAVANNAH RIVER.

In his Second and Final Report the Special Master has recommended a lateral seaward boundary between the

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[37] Discussed further, *supra*, at 38-41.

[38] The Master finds that Long Island and Barnwell Island No. 3 emerged after 1787. 1st Report at 62, 65. His recommendation that Long Island is in South Carolina rests on prescription and acquiescence. 1st Report at 65. If the Court does not uphold the Master on his recommendation based on prescription and acquiescence, the question of newly formed islands becomes more significant.

If the Special Master's use of the "right-angle principle" of delineation is not upheld, most of Long Island emerged on the Georgia side of the geographic middle. Appendix C. Even using the Special Master's "right-angle principle" a portion of Long Island emerged on the Georgia side. 1st Report at 62.

two States, using the principle of equidistance, as tempered by special circumstances, to arrive at an equitable apportionment of the offshore seabed between the two States. 2nd Report at 3-4, 15-16. The boundary which is recommended is a line perpendicular to the closing line between Hilton Head Island and Tybee Island[39] running easterly to the outer limit of the territorial sea. 2nd Report at 18.

Georgia excepts to the proposed lateral seaward boundary because of the Special Master's use of the navigation channel, rather than the geographic middle, as the starting point. If the Special Master is indeed incorrect, as Georgia contends, in his location of the mouth of the Savannah River, discussed above at 42-49, then the river boundary terminates, and the lateral seaward boundary must commence, at a point midway between the Georgia shore (Tybee Island) and the South Carolina shore (Daufuskie Island and Hilton Head Island). The Special Master declined Georgia's request to recommend an alternative lateral seaward boundary as it would be located using the geographic middle as the starting point. 2nd Report at 5 n.98. This boundary could, however, easily be demarcated by the principles which have been

[39] As part of a process to establish the coastline of the United States in the 1970's, the closing line from Hilton Head Island to Tybee Island was delineated by the United States Baselines Committee. T-II-113-17, 253-54. The closing line was drawn pursuant to Article 7 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1607, T.I.A.S. No. 5639, T-II-113-114, which allows a coastal state to close a bay which is not more than 24 miles at its mouth.

used by the Master, which would result in a correct boundary, north of and roughly parallel to the recommended line. Appendix B.[40]

CONCLUSION

The proper determination of the boundary between Georgia and South Carolina can come only from an application of the Treaty of Beaufort of 1787, as construed by the Court in *Georgia v. South Carolina*, to the islands under consideration here. The key principles set forth in those controlling documents, that all islands are in Georgia and that the boundary is in the geographic middle between any island and the South Carolina shore, are dispositive of the issues presented by this case. In light of these key principles, agreed to by South Carolina in 1787 and never repudiated, actions and inactions of private individuals and local government officials can work a change in the agreed-upon boundary only if there is clear evidence not only of prescription by South Carolina but also of acquiescence by Georgia.

Because of the Master's failure to follow those key principles, Georgia urges the Court to uphold Georgia's Exceptions to the First Report and to the Second and Final Report of the Special Master and to rule as follows:

[40] A lateral seaward boundary line parallel to the Special Master's recommended line (a perpendicular to the closing line) would be slightly more advantageous to Georgia than the line asserted by Georgia, which is equidistant from the closest points on the shores of Tybee Island, Georgia, and Hilton Head Island, South Carolina. Appendix B.

That the Barnwell Islands (except Rabbit Island), Oyster Bed Island and the unnamed islands upstream and downstream from Pennyworth Island are in Georgia; that the mouth of the Savannah River is the geographic middle between the South Carolina shore and the Georgia shore; that the geographic middle is a median line which is not drawn using a right angle principle; that all islands formed by nature in the Savannah River are in Georgia, even if formed after 1787; and that the lateral seaward boundary should commence at the point where the geographic middle of the Savannah River mouth intersects the closing line between Hilton Head Island and Tybee Island and that it be delineated according to the principles set forth in the Second and Final Report.

A decision rendered upholding Georgia's exceptions would not require additional hearings before the Special Master, except perhaps on the issue of the lateral seaward boundary. Even on that issue, reconsideration in light of specific direction from the Court would not seem to require extensive additional proceedings.

Respectfully submitted,

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APPENDIX A

APPENDIX A

TREATY OF BEAUFORT

Article the first.

The most northern branch or stream of the river Savannah from the sea or mouth of such stream to the fork or confluence of the rivers now called Tugoloo and Keowee, and from thence the most northern branch or stream of the said river Tugoloo till it intersects the northern boundary line of South Carolina if the said branch or stream of Tugoloo extends so far north, reserving all the islands in the said rivers Savannah and Tugoloo to Georgia; but if the head spring or source of any branch or stream of the said river Tugoloo does not extend to the north boundary line of South Carolina, then a west line to the Mississippi, to be drawn from the head spring or source of the said branch or stream of Tugoloo river which extends to the highest northern latitude – shall forever hereafter form the separation limit and boundary between the States of South Carolina and Georgia.

Article the second.

The navigation of the river Savannah at and from the bar, and mouth, along the north east side of Cockspur Island and up the direct course of the main northern channel, along the northern side of Hutchinson's Island, opposite the town of Savannah to the upper end of the said island, and from thence up the bed, or principal stream of the said river, to the confluence of the rivers Tugoloo and Keowee, and from the confluence up the

channel of the most northern stream of Tugoloo river to its source and back again by the same channel to the Atlantic ocean: Is hereby declared to be henceforth equally free to the citizens of both States, and exempt from all duties, tolls, hindrance, interruption or molestation whatsoever, attempted to be enforced by one State on the citizens of the other, and all the rest of the river Savannah to the southward of the foregoing description is acknowledged to be the exclusive right of the State of Georgia.

APPENDIX B

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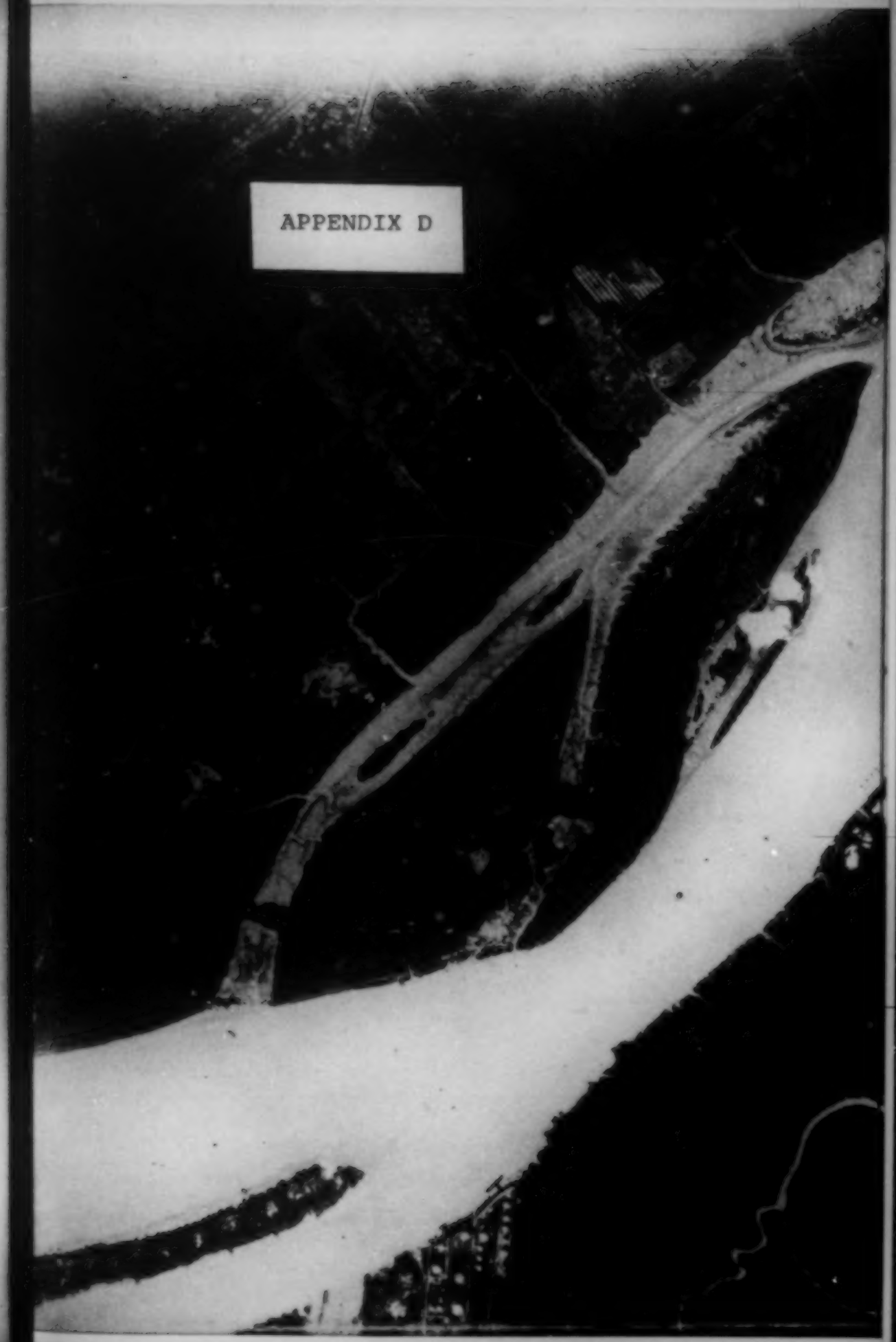
APPENDIX C

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APPENDIX D

APPENDIX D



APPENDIX E

APPENDIX E

BARNWELL ISLAND* CHRONOLOGY

Evidence That Barnwell Island Is In South Carolina	Evidence That Barnwell Island Is In Georgia
	6/9/1732 The Charter of Georgia. Ga.Ex. 6.
	12/4/1759 Tannatt's petition for grant of two small marsh islands in Savannah River. Ga.Ex. 93.
	Post-Revolutionary Compilation Plat of Survey for Tannatt, dated 5/12/1760, showing "two marsh islands." Ga.Ex. 94.
	12/3/1760 Grant signed to Tannatt for two marsh islands in Savannah River. Ga.Ex. 95.
	4/22/1763 Appraisement of Tannatt's Estate includes "165 acres marsh." Ga.Ex. 261.

*The largest island, called Hog by the Barnwells, and the small island just south and east, called Long by the Barnwells.

Unpublished and unrecorded letters, diaries, deeds and other personal papers are omitted. For deeds and plats, the date given is the date of recording.

Evidence In South Carolina	Evidence In Georgia
	9/13/1764 Tannatt's estate's advertisement for sale of 160 acres, two marsh islands in Savannah River. "The Georgia Gazette," September 13, 1764.Ga.Ex. 262.
	4/28/1787 The Treaty of Beaufort. Ga.Ex. 39.
	8/9/1787 Congressional Resolution ratifying the Treaty of Beaufort. Ga.Ex. 45.
	2/1/1788 Ga. ratification of Treaty of Beaufort. Ga.Ex. 43.
	2/29/1788 S.C. ratification of Treaty of Beaufort. Grimke's *Public Laws*, 460. Ga.Ex. 44.
8/3/1795 Grants and plats to Hezekiah Roberts. S.C.Ex. B-1, 2,3,4.	
3/24/1813 Grant and plat to Archibald Smith of "three marsh islands" containing 16, 104, and 42 acres. S.C.Ex. B-5,6.	

Evidence In South Carolina	Evidence In Georgia
1818 Sturgis and Early, "Map of the State of Georgia" failed to color the Barnwell Islands as part of Georgia. S.C.Ex. GM-10A, Ga.Ex. 110.	
	1825 Payment of taxes on "104 Acres Land Marsh Chatham" in Ga. by Archibald Smith. Ga.Ex. 398.
	1830 See 1831 below.
	1831 Chatham Co., Ga., Tax Digest entry for Estate of Archibald Smith: "104 acres Land Marsh Chatham County." "Same return for 1830." Ga.Ex. 401.
	5/17/1831 Inventory of Smith's Estate recorded in Chatham Co., Ga., shows "3 Islands Marsh." Ga.Ex. 400; S.C.Ex. B-10(11).
	1866 U.S. Coast Survey: "Topography of . . .- Batteries Tatnall & Barnwell, Georgia." Ga.Ex. 163.
1870 Beaufort County, S.C., tax records reflect that taxes were paid by or on behalf of the Barnwell family from 1870-1930's. (This entry is not repeated for each of these years.) S.C.Ex. B-13, 14.	

Evidence In South Carolina	Evidence In Georgia
1875 Version of Platen's map, "Chatham County, State of Georgia," appended to his manuscript book does not color Barnwell Islands in Chatham Co. In manuscript, Barnwell Islands not named in the enumeration of river islands. S.C.Ex. G-9, GM-11.	**1875** Version of Platen map, "Chatham County, State of Georgia," color indicates naval battery (Ft. Tatnall) and Long Island in Chatham. Ga.Ex. 461.
	1875 Another version of Platen's map shows under "Places of Historical Interest," in Chatham Co., "Fort Tatnall, on a small sandy spur in front of Fort Jackson." Ga.Ex. 462.
7/25/1881 Agreement dated 3/2/1823, between Screven, Bond, and Archibald Smith, and annexed plat, showing Barnwell Islands labelled "Smith's Land," and "Boundary Creek" separating the islands from the South Carolina shore. Ga.Ex. 397, S.C.Ex. B-9.	
1911 U.S. Dept. of Agriculture Soil Map showing Barnwell Islands (except for Rabbit) in Georgia. Ga.Ex. 424.	

Evidence In South Carolina	Evidence In Georgia
	1916 Decision in *Georgia Rwy & Power Co. v. Wright*, 146 Ga. 29 (1916): "[A]ll the Savannah River where it is broken by islands, which is between the island and the Georgia shore, is within the jurisdiction and sovereignty of Georgia, and all improvements constructed thereon are property subject to taxation within this State." 146 Ga. at 32.
	1917 U.S. Coast & Geodetic Survey Publication locates triangulation station on Barnwell Island as being in Georgia. Ga.Ex. 421, 422.
	1920 U.S. Corps of Engineers Map, Savannah Quadrangle, showing Barnwell Islands (except Rabbit Island) in Georgia. Ga.Ex. 425.
	1922 *Georgia v. South Carolina*, 257 U.S. 516 (1922): "Where there are islands the [boundary] line is midway between the island bank and the South Carolina shore when the water is at ordinary stage." 257 U.S. at 523.

Evidence In South Carolina	Evidence In Georgia
	1932 U.S.G.S. Map, "State of Georgia," showing the Barnwell Islands (except Rabbit) in Georgia. Ga.Ex. 433.
1932 Arrest Warrant, Indictment, Judgment, and Sentence of the Court of General Sessions of Beaufort County, S.C., for two men for shooting Eustace Pinckney in Beaufort County, S.C., reportedly on Barnwell Island. S.C.Ex.B-56, 60, S.C.Ex.-C.	
10/6/1935 Beaufort County Sheriff McTeer seized and posted the lands of Miss C. C. Barnwell, C. C. Barnwell and E.A. Barnwell described in the deeds of 2/28/1940, listed below. S.C.Ex. B-10(13), 60.	
2/1936 Sheriff McTeer attempted a sale of the lands of Miss C. C. Barnwell, C. C. Barnwell and E.A. Barnwell described in the deeds of 2/28/1940, listed below. S.C.Ex. B-10(13),60.	

Evidence In South Carolina	Evidence In Georgia
1937 South Carolina State Highway Department Map showing the Barnwell Islands in South Carolina. S.C.Ex. GM-13.	
1939 State Planning Board of Ga. Sketch showing the Barnwell Islands in S.C. S.C.Ex. GM-14.	
2/28/1940 Three deeds from Sheriff McTeer to Forfeited Land Commission (FLC) of land of Miss C.C. Barnwell, C.C. Barnwell, and E.A. Barnwell. S.C.Ex. B-10(13), D-5.	**1940** Ga. State Highway Map, Chatham Co., showing Barnwell Islands (except Rabbit) in Ga. Ga.Ex. 426.
1941 Beaufort County, S.C., tax records (for 1952-1956, the Jasper County tax records) reflect that taxes were paid by Eustace B. Pinckney from 1941-1956. S.C.Ex. B-13. (This entry is not repeated for each of these years.)	
No Date Given (pre-1952) Deed dated 1/6/42, from FLC of land formerly owned by C.C. Barnwell, E.A. Barnwell, and Miss C.C. Barnwell to Eustace B. Pinckney, Sr. S.C.Ex. B-10(14).	

Evidence In South Carolina	Evidence In Georgia
1946 Arrest Warrant, Indictment, Judgment and Sentence of the Court of General Sessions of Beaufort County, South Carolina for two men for stealing three hogs in Beaufort County, South Carolina, reportedly on Barnwell Island. S.C.Ex. B-57, 60.	
11/13/47 Plat of tract for Corps of Engineers Disposal Area showing a small portion of Long Island. S.C.Ex. B-10(16).	
	12/11/52 Complaint filed in *United States of America v. 450 Acres, More or Less, Known as Barnwell Island, Situate in Chatham County, Georgia, and E.B. Pinckney,* (S.D. Ga.). Ga.Ex. 378.
	1/23/53 Service of Notice of Complaint in *United States v. 450 Acres* on Auditor, Forfeited Land Commission, Sheriff, & Treasurer of Beaufort County, S.C. Ga.Ex. 378.
2/19/1953 *U.S. v. 450 Acres,* complaint dismissed, on the ground that the property lay in South Carolina.	**4/1/53** Intervention of Georgia in *United States v. 450 Acres.* Ga.Ex. 378.

Evidence In South Carolina	Evidence In Georgia
	1953 Ga. State Highway Map, Chatham Co., Ga., showing Barnwell Islands (except Rabbit) in Ga. Ga.Ex. 427.
1955 "Savannah, Ga.-S.C." U.S.G.S. Quadrangle, showing all the Barnwell Islands in South Carolina, S.C.Ex. GM-26.	**1955** U.S. Corps of Engineers Map, "Barnwell Island, Chatham County, Georgia." Ga.Ex. 382.
9/8/55 S.C. Motion for Leave to File Complaint, *South Carolina v. Georgia.* Ga.Ex. 379.	**3/22/55** *United States v. 450 Acres of Land,* 220 F.2d 353 (5th Cir. 1955), reversing the District Court and holding that Barnwell Island is in Georgia.
	9/26/55 Georgia's Brief in Opposition to South Carolina's Motion for Leave to File Complaint, *South Carolina v. Georgia.* Ga.Ex. 379.
	10/10/55 Denial of S.C.'s Motion for Leave to File Complaint in *South Carolina v. Georgia.* 350 U.S. 812 (1955).
	10/10/55 Denial of cert. in *U.S. v. 450 Acres of Land, More or Less, Known as Barnwell Island, Situate in Chatham County, Georgia v. United States of America,* 350 U.S. 826 (1955).

Evidence In South Carolina	Evidence In Georgia
1956 Map showing Barnwell Island in South Carolina and titled "Port Facilities, Savannah, Georgia, Savannah District Authority." S.C.Ex. BM-6.	3/9/56 Ga. Resolution granting to U.S. a spoilage easement to Barnwell Island. GA 381.
	9/21/56 Deed of a perpetual spoilage easement dated 3/9/56 from Ga. to the U.S. Ga.Ex. 383.
1/2/57 S.C. Motion for Leave to File Complaint, *South Carolina v. Georgia*. Ga.Ex. 380.	2/28/57 Ga. Brief in Opposition to S.C.'s Motion for Leave to File Complaint, *South Carolina v. Georgia*. Ga.Ex. 351.
	3/11/1957 Denial of S.C.'s Motion for Leave to File Complaint in *South Carolina v. Georgia*, 350 U.S. 1030 (1957). Ga.Ex. 380.
	1957 U.S.G.S. Map, "Savannah, Ga., – S.C.," showing Barnwell Islands (except Rabbit) in Ga. Ga.Ex. 436.
1959 "General Highway Map, Jasper County, South Carolina," S.C. Highway Dept. S.C.Ex. GM-15.	1959 U.S.G.S. Map, "State of Georgia" showing Barnwell Islands (except Rabbit) in Ga. Ga.Ex. 433.
	1960 Ga. Highway Dept. Map, "General Highway Map, Chatham County, Ga.," showing Barnwell Islands (except Rabbit) in Ga. Ga.Ex. 428.

Evidence In South Carolina	Evidence In Georgia
c. 1961 "Mosaics of Georgia Coastal Area," Georgia Highway Department. S.C.Ex. GM-29.	1961 Ga. Highway Dept. Map, in cooperation with U.S. Dept. of Commerce, "Savannah, Ga.," showing Barnwell Islands (except Rabbit) in Ga. Ga.Ex. 431.
1965 U.S. Soil Conservation Service Photos BQO-3GG-86 and BQO-2GG-280 showing Barnwell Islands in S.C. S.C.Ex. GM-17.	1965 Ga. Highway Dept. Map, "General Highway Map, Chatham County, Ga." showing Barnwell Islands (except Rabbit) in Ga. Ga.Ex. 429.
1969 "General Highway Map, Jasper County, S.C." S.C. Highway Dept. S.C.Ex. GM-16.	1966 U.S. Corps of Engineers Map, "Real Estate, Savannah Harbor," showing Barnwell Islands (except Rabbit) in Ga. Ga.Ex. 363.
	1970 U.S.G.S. Map,"State of South Carolina," showing Barnwell Islands (except Rabbit) in Ga. Ga.Ex. 435.
	1970 U.S.G.S. Map, "State of Georgia," showing Barnwell Islands (except Rabbit) in Ga. Ga.Ex. 434.

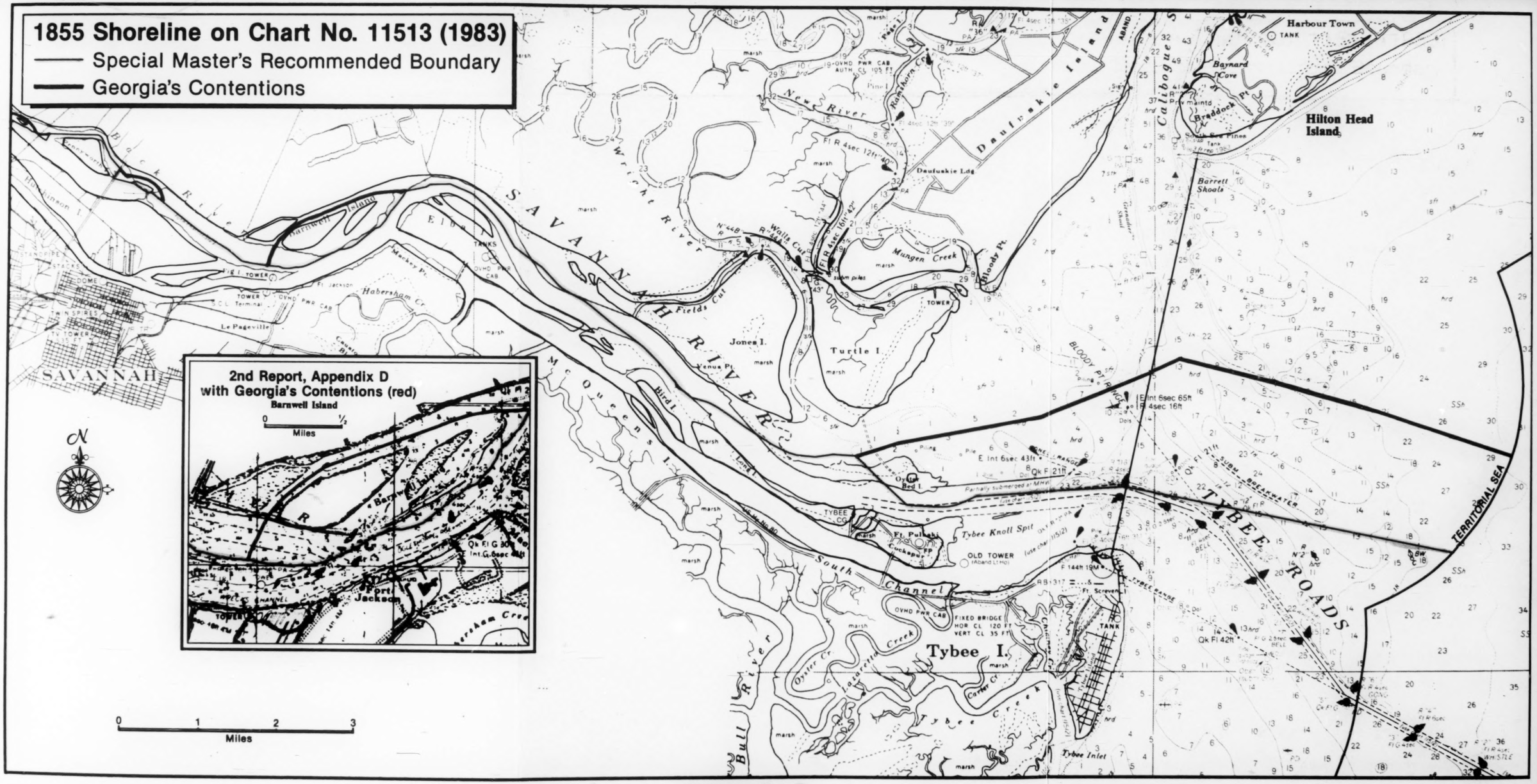
Evidence In South Carolina	Evidence In Georgia
	6/3/70 Letter from State Geologist, S.C. State Development Board, to Chief Topographic Engineer, U.S.G.S., indicating that corrections to the proposed 1970 edition of U.S.G.S. base map "State of South Carolina" (Ga.Ex. 435) would be submitted within 10 days. Ga.Ex. 576.
	6/16/70 Letter from Alan J. Lehocky, Division of Geology, S.C. State Development Board, to Chief Topographic Engineer, U.S.G.S., setting forth S.C.'s corrections to the proposed edition of the U.S.G.S. base map "South Carolina" (Ga. Ex. 435) and noting no corrections concerning the boundary between Ga. and S.C. Ga.Ex. 476.
	1971 "Savannah, Ga. – S.C." U.S.G.S. Quadrangle, showing Barnwell Islands (except Rabbit) in Ga. Ga.Ex. 219.
	1/28/72 Chatham Co., Ga., Tax Map, showing Barnwell Islands (except Rabbit) in Ga. Ga.Ex. 441.

Evidence In South Carolina	Evidence In Georgia
	1974 U.S.G.S. "Savannah, Georgia-South Carolina," showing Barnwell Islands (except Rabbit) in Ga. Ga.Ex. 437.
9/80 *Resource Atlas*, prepared by South Carolina Wildlife and Marine Resources Dept. for the United States Fish and Wildlife Service, Office of Biological Services, Plate 16, showing the Barnwell Islands in S.C. S.C.Ex. GM-61.	**9/80** *Resource Atlas*, prepared by South Carolina Wildlife and Marine Resources Dept. for the United States Fish and Wildlife Service, Office of Biological Services, Plate 42, showing the Barnwell Islands (except Rabbit), in Ga. Ga.Ex. 467.
	No Date Current Jasper County, S.C., Tax Map, Rabbit Island Area, showing Barnwell Islands (except Rabbit) in Ga. S.C.Ex. BM-7.

APPENDIX F

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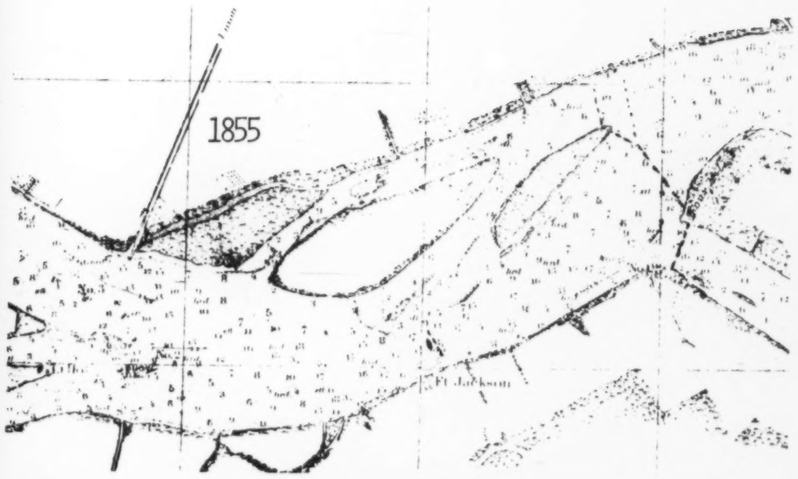

1855 Shoreline on Chart No. 11513 (1983)
Special Master's Recommended Boundary
Georgia's Contentions
2nd Report, Appendix D
with Georgia's Contentions (red)
Barnwell Island
0 ½ Miles
0 1 2 3 Miles
SAVANNAH RIVER
Hilton Head Island
Harbour Town
Daufuskie Island
Daufuskie Ldg
Jones I.
Turtle I.
Tybee I.
Tybee Knoll Spit
TYBEE ROADS
TERRITORIAL SEA
South Channel
Bull River
Tybee Inlet
Fields Cut
Wilson River
News River
Mungen Creek
Bloody Pt.
Barrett Shoals
Braddock Pt.
Baynard Cove
Oyster Bed I.
OLD TOWER
FIXED BRIDGE
HOR CL 120 FT
VERT CL 35 FT
Ft. Pulaski
Cockspur FP
Ft. Screven
SAVANNAH
Barnwell Island
Port Jackson
Le Page ville
Habersham Cr.
Bird I.
Long I.
McQueens I.
Elba I.
Wright River
Back River
Oyster Cr.
Lazaretto Creek
Tybee Creek
Corner Cr.
Ramshorn Cr.
Venus Pt.
Bloody Pt. Range
Tybee Range
Oak Island Light
Daufuskie Island
Calibogue Sound

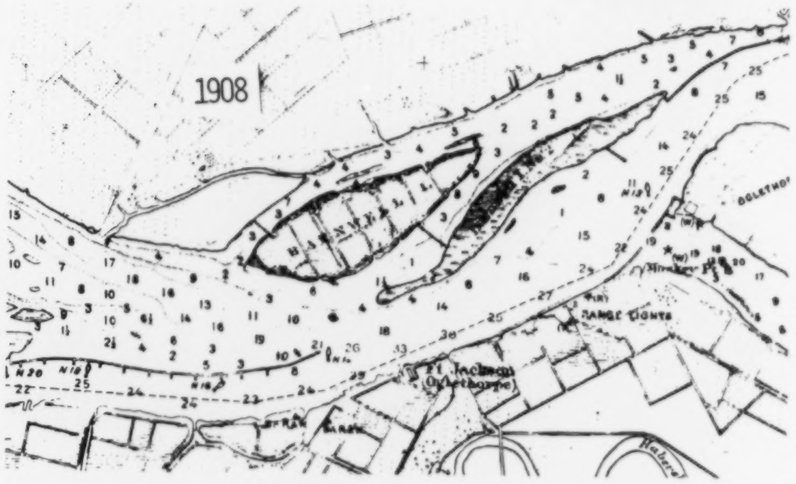
Appendix B

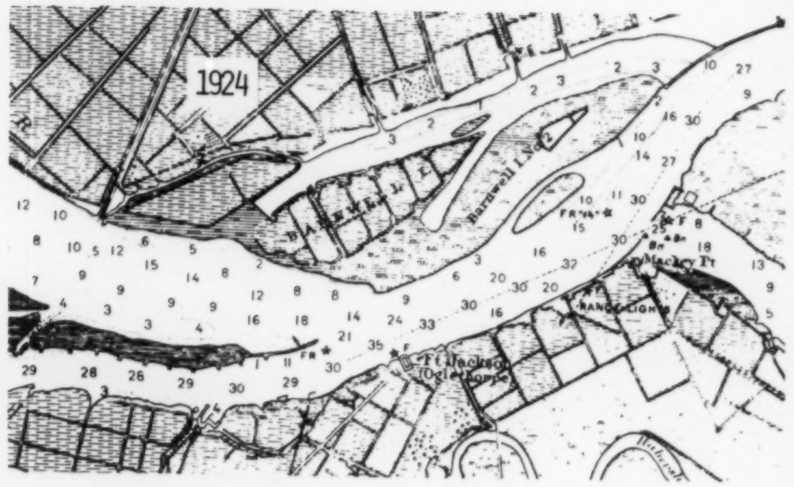
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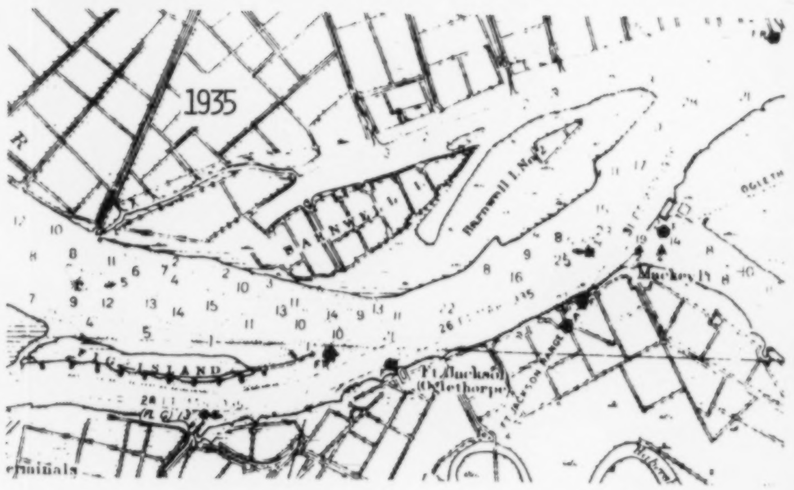
BARNWELL ISLAND
1855 - 1978

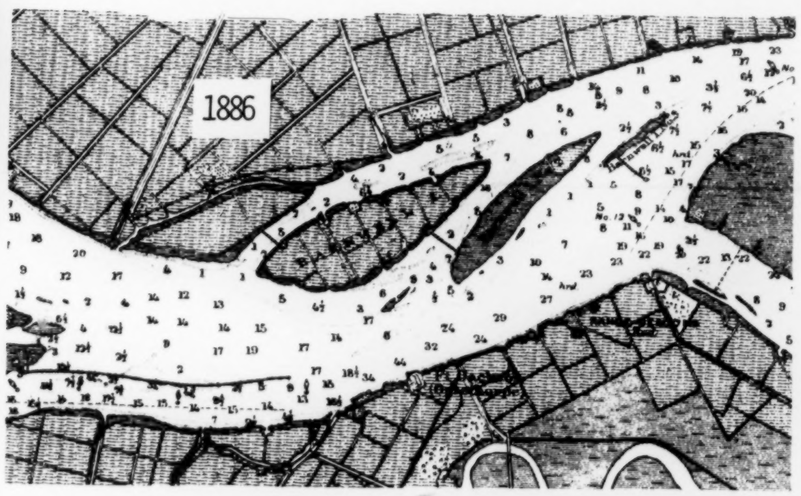
PLAINTIFF'S EXHIBIT 463

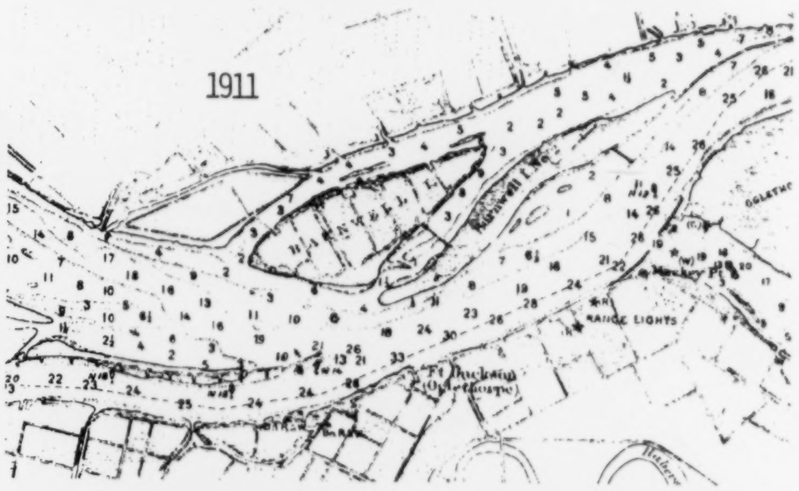


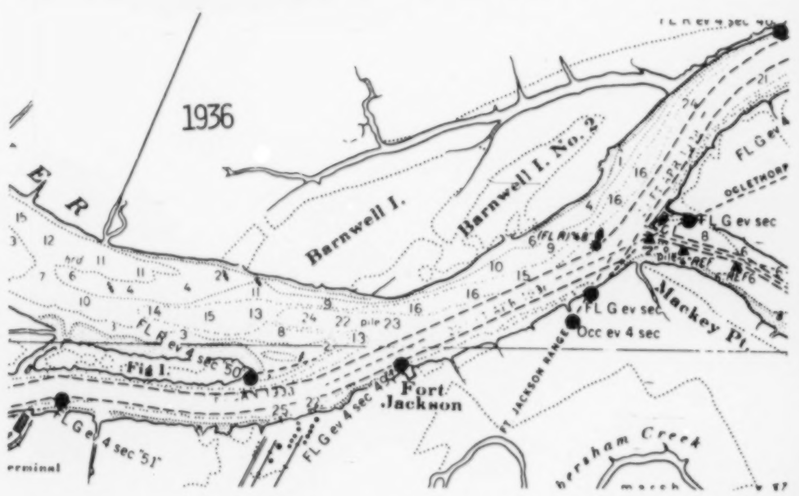


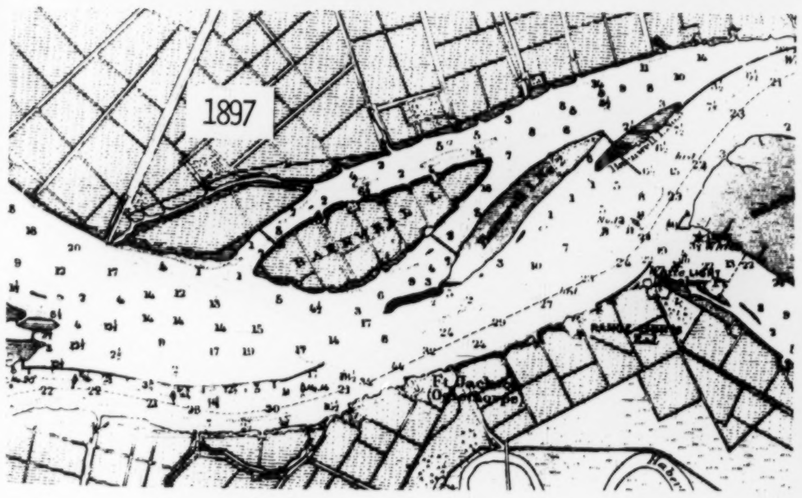


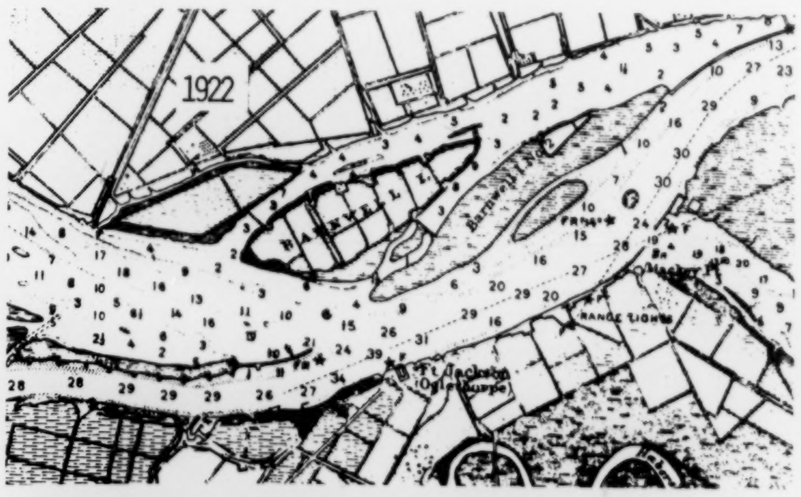


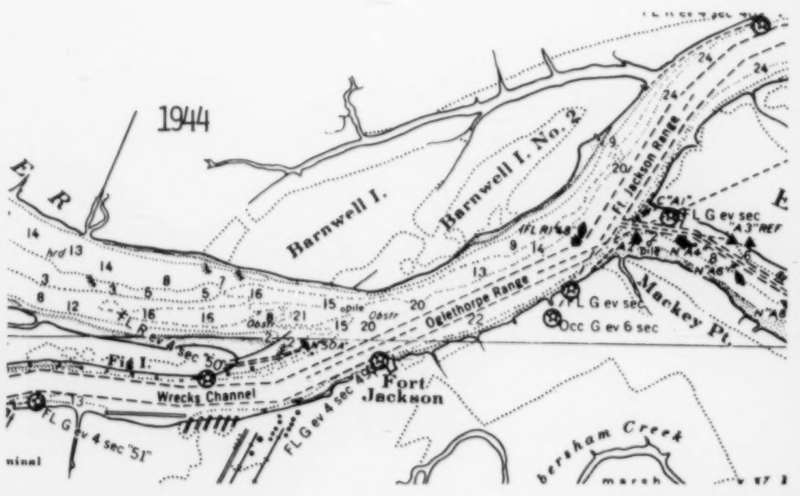


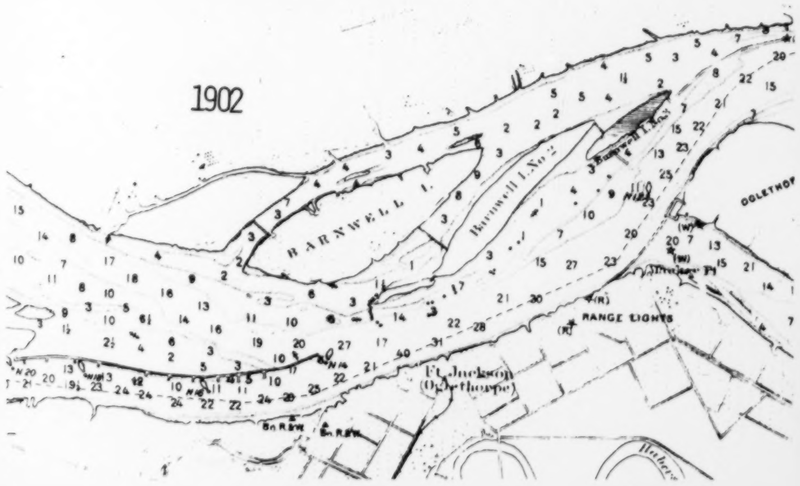


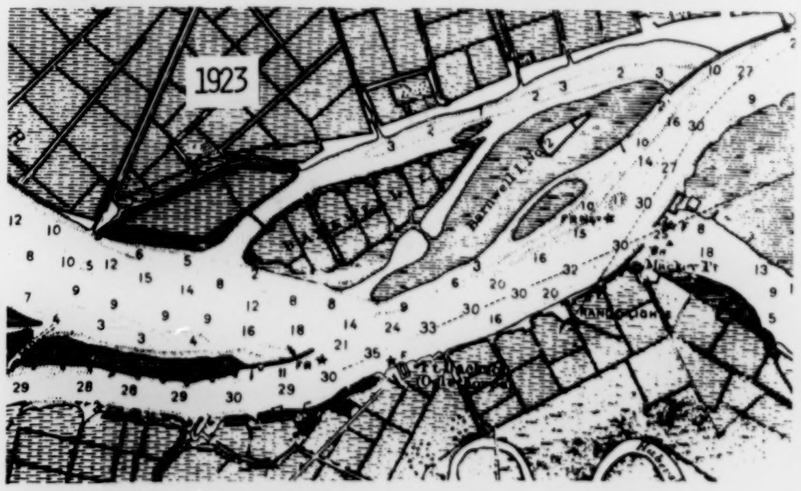


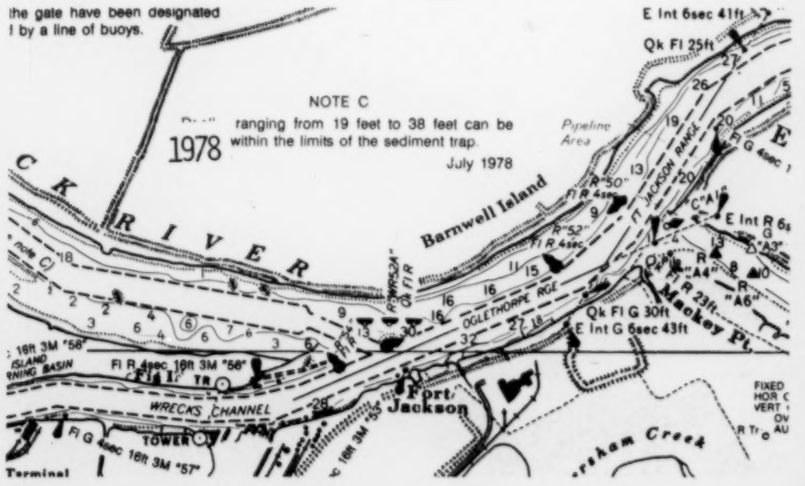


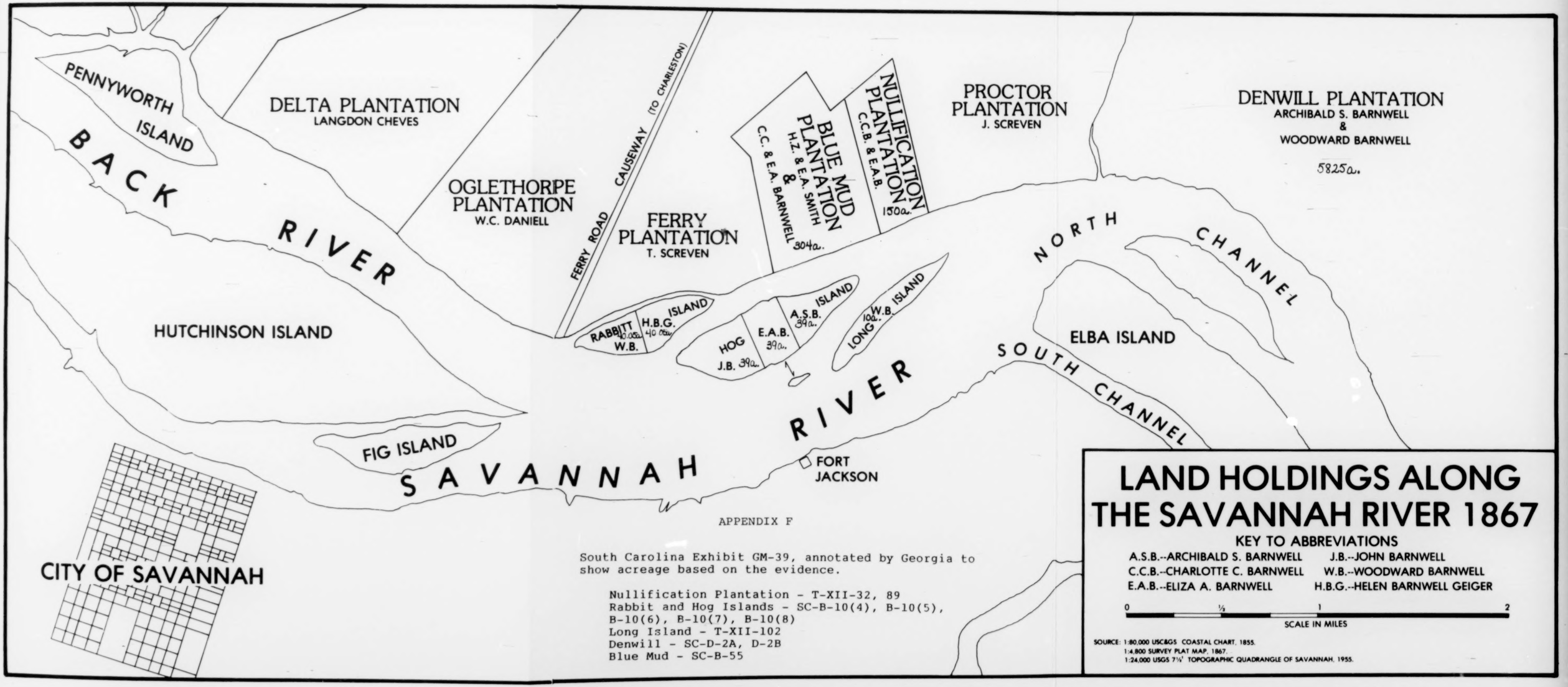












APPENDIX F

South Carolina Exhibit GM-39, annotated by Georgia to show acreage based on the evidence.

Nullification Plantation - T-XII-32, 89
Rabbit and Hog Islands - SC-B-10(4), B-10(5), B-10(6), B-10(7), B-10(8)
Long Island - T-XII-102
Denwill - SC-D-2A, D-2B
Blue Mud - SC-B-55

LAND HOLDINGS ALONG THE SAVANNAH RIVER 1867

KEY TO ABBREVIATIONS

A.S.B.--ARCHIBALD S. BARNWELL
J.B.--JOHN BARNWELL
C.C.B.--CHARLOTTE C. BARNWELL
W.B.--WOODWARD BARNWELL
E.A.B.--ELIZA A. BARNWELL
H.B.G.--HELEN BARNWELL GEIGER

0 ½ 1 2
SCALE IN MILES

SOURCE: 1:80,000 USC&GS COASTAL CHART, 1855.
1:4,800 SURVEY PLAT MAP, 1867.
1:24,000 USGS 7½' TOPOGRAPHIC QUADRANGLE OF SAVANNAH, 1955.